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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Diane Place, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceedings on May 15, 1974.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is reprinted in 7 EPD ¶9367 and in the Appendix hereto, *infra,* at pp. 11a-17a. The opinion of the District Court, which is not reported, is reprinted in 6 EPD ¶9010, and is set out in the Appendix hereto, *infra,* at pp. 1a-10a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Did the District Court have jurisdiction to remedy discrimination in employment on the basis of sex by the United States, where the discrimination was alleged to have occurred prior to March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972?

Statutory Provisions Involved

Section 717(a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(a), provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e-16(c), provides:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred

to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 7151, 5 U.S.C., provides:

> It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy.

Section 1 of Executive Order 11478 provides:

> It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and

agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Statement of the Case

Petitioner is a female employee of the Food and Drug Administration of the Department of Health, Education and Welfare. Petitioner, who is presently a GS-12, has not been promoted for 7 years.

On September 24, 1971, petitioner filed a formal complaint with the Equal Employment Opportunity officer alleging that she had been discriminated against because of her sex. The administrative complaint was denied, and on August 15, 1972, that denial was affirmed by the Board of Appeals and Review of the United States Civil Service Commission. This action was commenced on September 13, 1972, in the United States District Court for the Eastern District of Michigan.

Petitioner's complaint alleged that the defendant officials had discriminated against her in that, solely because of her sex, they had denied her a promotion to which she was lawfully entitled, refused to upgrade the job classification for the work she was doing, denied her training and counseling necessary for promotion, and interfered with her efforts to obtain additional training by denying her leave time or compensation to take job related college courses. The complaint alleged that similarly situated male employees of the Food and Drug Administration were promoted beyond a GS-12, and provided with training and educational assistance which were denied to women employees generally

and petitioner in particular. The complaint further asserted that petitioner had been the victim of retaliation because she had filed an administrative complaint.

The Civil Service Commission statistics reveal that, as of October, 1972, women constituted 58.0% of the white collar employees of the Department of Health Education and Welfare, but only 16.9% of the GS-13 employees, and an even smaller proportion of employees with higher GS ratings. Among the lowest paid agency employees, women were over 80% of all employees under GS-7.[1] During the previous six years, while petitioner was locked into her GS-12 rating unable to obtain promotion, the proportion of GS-13 employees who were women actually *declined*. In 1966 women had constituted 19.1% of that group.[2]

Jurisdiction over petitioner's action was asserted to exist by virtue of the 1972 amendments to Title VII of the 1964 Civil Rights Act. Although Title VII as originally enacted had excluded federal employees from its coverage, Congress in 1972 had added section 717(c), which expressly authorized private civil litigation by federal employees aggrieved by discrimination on the basis of sex, race, religion, or national origin. The effective date of this amendment was March 24, 1972, six months before the filing of the instant action. Jurisdiction was also founded upon several other provisions, including the Tucker Act, 28 U.S.C. §1346, and Executive Order 11478.

The United States moved to dismiss the action for lack of jurisdiction, arguing that section 717(c) only created

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[1] Federal Civilian Employment: Women, 1972 Study, p. 36, Table I-C.

[2] Study of Employment of Women in the Federal Government, 1968.

a cause of action for unlawful discrimination which occurred after the effective date of the 1972 amendments. The government did not deny that discrimination on the basis of sex was illegal prior to March 24, 1972, but urged that no statute enacted prior to section 717(c) gave federal employees any right to remedy such illegality. Petitioner maintained that such a cause of action existed prior to the enactment of section 717(c), and that that amendment to Title VII, since it created no new substantive right but merely augmented the procedural remedies, should be applied to all claims of discrimination still pending on March 24, 1974.

On July 5, 1973, the District Court granted the government's motion to dismiss, and the Court of Appeals for the Sixth Circuit affirmed that decision on May 15, 1974.

Reasons for Granting the Writ

As this Court recognized in *Reed* v. *Reed,* 404 U.S. 71 (1971), government action which arbitrarily discriminates between two persons similarly situated solely because of their sex is constitutionally impermissible. That principle is of particular importance when the treatment of federal employees is at stake, for in such cases discrimination affects adversely not only the victimized employee, but also the efficiency of the national government which fails to draw fully upon the skills of its workers and needlessly offends the sensibilities of those with whom it must deal. Compare *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

Despite these principles, discrimination on the basis of sex, like discrimination based on race, has a long history in the federal government. For the first century of our country's existence female employees were virtually un-

known in the federal service. Not until the Classification Act of 1923 did Congress require that women and men be paid the same wages for equal work. Only in 1962 did Congress repeal the last of the nineteenth century laws which countenanced promoting only men to the higher grades. United States Civil Service Commission, Study of Employment of Women in the Federal Government, 1968, pp. 1-2. In 1966 Congress established it to be the national policy that all federal employees should be afforded the same employment opportunities without regard to sex. 5 U.S.C. §7151. In 1967 the Executive Orders which a generation earlier had prohibited discrimination on the basis of race were amended to condemn as well discrimination on the basis of sex. Executive Order 11375.

Five years later Congress concluded that neither section 7151 nor Executive Order 11375 had succeeded in eradicating discrimination on the basis of sex or race in Federal employment. The House Committee on Education and Labor[3] and the Senate Committee on Labor and Public

[3] "The disproportionate distribution of minorities and women throughout the federal bureaucracy and their exclusion from higher policy making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity." H. Rep. No. 92-238, 92nd Cong., 1st Sess. p. 23.

Welfare[4] found that the vast majority of the female and minority employees were restricted to the lowest federal grades. In the years since Congress had mandated equal employment opportunities by enacting §7151, the proportion of women in higher paid and supervisory positions had not

[4] "Statistical evidence shows that minorities and women continue to be denied access to a large number of government jobs, particularly in the higher grade levels. The disparity can be clearly seen in figures presented in a recent report released by the Civil Service Commission, *Minority Group Employment in the Federal Government* (1970). On the basis of the figures presented therein, the following listing shows the percentage of minority group employees under the General Schedule by grade level:

	Negro	Spanish-surnamed	American Indian	Oriental
GS-1 through GS-4	21.8	3.0	1.8	.6
GS-5 through GS-8	13.5	2.2	.7	.8
GS-9 through GS-11	5.1	1.5	.5	1.0
GS-12 through GS-13 ..	2.7	.8	.2	.9
GS-14 through GS-15 ..	1.7	.7	.2	.8
GS-16 through GS-18 ..	1.4	.3	.1	.2

Minorities represent 19.4% of the total employment in the Federal government (15.0% are Negroes, 2.9% are Spanish-surnamed, 0.7% are American Indians, and 0.8% are Oriental). Their concentration in the lower grade levels indicates that their ability to advance to the higher levels has been restricted. . . . Mrs. Daisy B. Fields, past president of Federally Employed Women (FEW), testified as to the distribution, by percent, of all women employed by the federal government (approximately 665,000 or about 34%) as represented by the following breakdown:

	Percent
GS-1 through GS-6	76.7
GS-7 through GS-12	21.7
GS-13 and above	1.7"

S. Rep. No. 92-415, 92nd Cong., 1st Sess., p. 13.

increased significantly.[5] Both the House[6] and Senate[7] committees concluded that a major cause of this continued discrimination was that aggrieved federal employees, unlike private employees covered by Title VII, did not have ready access to the courts. The Senate Committee noted in particular the practice of the Department of Justice of asserting sovereign immunity to prevent the courts from remedying discrimination on the basis of race or sex. Singled out in the hearings as obstructing such judicial relief on the grounds of sovereign immunity was the decision of the Eighth Circuit in *Gnotta* v. *United States*,

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[5] The percentage of federal employees who were women changed as follows:

	1966	1970	Difference
GS-13	4.0	4.5	+0.5
GS-14	3.5	3.6	+0.1
GS-15	2.4	3.3	+0.7
GS-16	1.8	1.8	0
GS-17	1.4	1.1	—0.3
GS-18	.8	1.3	+0.5
Above GS-18	1.9	1.3	—0.6

United States Civil Service Commission, Study of Employment of Women in the Federal Government, 1968, p.21, Table B; Federal Civilian Employment, Women, 1972 Study, p.12.

[6] "Despite the series of executive and administrative directives on equal employment opportunity, federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court review is available to the aggrieved federal employee." H. Rep. No. 92-238, 92nd Cong., 1st Sess., p. 25.

[7] "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved federal does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt." S. Rep. No. 92-415, 92nd Cong., 1st Sess., p. 16.

415 F.2d 1271 (8th Cir. 1969), cert. denied 397 U.S. 934.[8] The unavailability of judicial review was particularly serious because Congress concluded that the administrative grievance machinery for both procedural and substantive reasons had proved singularly ineffective in remedying discrimination.[9] To augment the inadequate judicial and administrative remedies which already existed to enforce the established prohibition against discrimination on the basis of race or sex in federal employment, Congress on March 24, 1972, enacted section 717(c) confirming in unequivocal language the right of federal employees to bring actions in the United States district courts to remedy such discrimination. *Morton* v. *Mancari*, 41 L.Ed.2d 290, 300 (1974).

Two and one half years after Congress disavowed the defense of sovereign immunity and the principles enunciated in *Gnotta* v. *United States*, the Department of Justice is persistently relying on sovereign immunity and *Gnotta* to restrict access to the federal courts. Since the enactment of section 717, as many as half of all the cases filed under that section have involved acts of discrimination which occurred prior to March 24, 1972. The government has maintained that none of these cases can be brought under section 717, arguing that that provision should only apply to discrimination occurring after that date. The government further maintains that any federal employee who was discriminated against before March 24, 1972, has no judicial remedy whatever. A majority of the courts to which this argument has been made have rejected it out

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[8] See Hearings on S.333 Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970).

[9] H. Rep. No. 92-238, 92nd Cong., 1st Sess., pp. 24-26; S. Rep. No. 92-415, 92nd Cong., 1st Sess., pp. 14-17.

of hand. This is one of the few cases in which the government has prevailed.

The Sixth Circuit concluded that section 717(c) could not be applied to this case because of a "presumption" that, in the absence of a clear expression to the contrary, new statutes will not be applied to litigation pending on the date of their enactment and involving events transpiring prior to that date. P. 14a. The court incorrectly characterized such an application as "retroactive". See n. 13, *infra*. The Court of Appeals held the remedies of section 717(c) unavailable since Congress had not specifically provided that the provision would cover claims of discrimination occurring prior to, or pending before the Civil Service on, March 24, 1972. The Sixth Circuit also held that sovereign immunity and *Gnotta* v. *United States* precluded judicial relief in any case of employment discrimination not covered by section 717(c). P. 16a.

The decision of the Sixth Circuit is in square conflict with the decision of the Fourth Circuit Court of Appeals in *Koger* v. *Ball*, —— F.2d —— (4th Cir. 1974), 7 EPD ¶9360, pp. 19a-129a. In *Koger*, on facts virtually identical to those in the instant case, the Fourth Circuit held that section 717(c) must be applied to acts of discrimination occurring prior to March 24, 1972. Unlike the Sixth Circuit, which suggested section 717(c) involved "new rights", pp. 12a-15a, the Fourth Circuit held that section 717(c) was only an additional remedy.

> The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination. Section 717(c) simply created a new remedy for the enforcement of this existing right. P. 22a.

The Sixth Circuit held that a law was "presumed" not to apply to pending litigation involving prior events "unless there is a clear expression to the contrary", p. 14a, but the Fourth Circuit adopted the contrary rule

> Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment. . . . The general rule has been applied to cases affected by either the enlargement or the contraction of jurisdiction even though the causes of action arose before the enactment of the statutes that changed the court's jurisdiction. P. 23a.

The Sixth Circuit rejected as erroneous district court decisions applying 717(c) to prior discrimination in *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) and *Johnson* v. *Froehlke*, 5 EPD ¶8638 (D. Md. 1973), and followed instead the precedents to the contrary in *Mosley* v. *United States*, 6 EPD ¶8875 (S.D. Cal. 1973) and *Freeman* v. *Defense Construction Supply Center*, 5 EPD ¶8526 (S.D. Ohio). P. 16a. The Fourth Circuit expressly rejected *Mosley* and *Freeman* and followed the decisions in *Walker* and *Johnson*. P. 18a, n. 2.

The decision of the Sixth Circuit is also in conflict with at least twelve district court decisions holding that the provisions of section 717(c) apply to discrimination occurring prior to March 24, 1972. *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) expressly adopted the rule of construction rejected by the Sixth Circuit:

> The 1972 Act is clearly remedial. The Act fits the classic definition of legislation which affords a remedy or facilitates remedies already existing for the enforcement of rights and redress of injuries . . . The general rule of construction is that a remedial statute shall be so construed as to make it effect its evident purpose

> and if the reason of the statute extends to past transactions as well as to those in the future, then it will be so applied.

357 F.Supp. at 751. See also *Harrison* v. *Butz*, 5 EPD ¶8632 (D.D.C. 1973); *Jackson* v. *United States Civil Service Commission*, 7 EPD ¶9134 (S.D. Tex. 1973). In *Johnson* v. *Lybecker*, 7 EPD ¶9191 (D. Ore. 1974) and *Henderson* v. *Defense Contract Administration*, 7 EPD ¶9058 (S.D. N.Y. 1973), the district courts argued, as did the Fourth Circuit later in *Koger*, that section 717(c) did not create a new substantive right, but merely a new remedy.

> Federal employees had a right to be free from job discrimination long before the passage of the 1972 Act. *Walker* v. *Kleindienst, supra.* They also had various available remedies. Prior to the effective date of the 1972 Act, federal employees were held to have remedies in the federal courts under 28 U.S.C. §1346(a), and the Administrative Procedure Act 5 U.S.C. §702. . . . Relief, however, was limited under those remedies. The Equal Employment Opportunity Act of 1972 was intended to provide additional remedies for employees subject to job discrimination.

Johnson v. *Lybecker*, 7 EPD p. 6978. See also *Pointer* v. *Sampson*, 5 EPD ¶8610 (D.D.C. 1973); *Johnson* v. *Froehlke*, 5 EPD ¶8638 (D. Md. 1973); *Fears* v. *Catlin*, 7 EPD ¶9135 (D. Colo. 1974); *Ficklin* v. *Sabatini*, 7 EPD ¶9307 (E.D. Pa. 1974); *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973); *Gautier* v. *Weinberger*, 6 EPD ¶9001 (D.D.C. 1973); *Grubbs* v. *Butz*, 6 EPD ¶8763 (D.D.C. 1973).

The conflict between the Fourth and Sixth Circuits regarding section 717(c) is reflected in a similar conflict among the district courts. Although most of the district

courts have concluded that section 717(c) should be applied to discrimination prior to its effective date, a minority have reached the opposite conclusion. In *Jones* v. *United States*, 7 EPD ¶3982 (D.D.C. 1974), the district court held, in contrast to *Koger*, that new statutes were presumed not to apply to litigation pending on then effective dates. In *Hill-Vincent* v. *Richardson*, 359 F.Supp. 308 (N.D. Ill. 1973) the district court concluded section 717(c) could not apply to prior discrimination because, unlike section 14 of the 1972 Act, there was no express provision authorizing such application. This same argument was considered and rejected by the Fourth Circuit in *Koger* v. *Ball*, pp. 26a-27a. See also *Palmer* v. *Rogers*, 6 EPD ¶8822 (D.D.C. 1973); *Mosley* v. *United States*, 7 EPD ¶8875 (S.D. Cal. 1973); *Feiger* v. *Warner*, 7 EPD ¶9140 (S.D. Cal. 1974); *Nimitz* v. *Berzak*, 7 EPD ¶9273 (E.D. La. 1974). Within the last year the district courts have repeatedly noted the existence of this widespread conflict. See *Harrison* v. *Butz*, 5 EPD ¶8832 (D.D.C. 1973); *Jackson* v. *United States Civil Service Commission*, 7 EPD ¶9134 (S.D. Tex. 1973); *Fears* v. *Catlin*, 7 EPD ¶9135 (D. Colo. 1974); *Johnson* v. *Lybecker*, 7 EPD ¶9191 (D. Ore. 1974); *Palmer* v. *Rogers*, 6 EPD ¶8822 (D.D.C. 1973); *Jones* v. *United States*, 7 EPD ¶9382 (D.D.C. 1974); *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002 (W.D. Pa. 1973).

Insofar as the Sixth Circuit held there is no cause of action outside of section 717(c) to remedy Federal employment discrimination, the decision below was in clear conflict with the decisions of the Fifth Circuit and the Court of Claims. The Court below noted that while the Eighth Circuit had disallowed civil actions to enforce Executive Order 11478 in *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied* 397 U.S. 934, the Court of Claims had reached the contrary result in *Chambers* v.

United States, 451 F.2d 1045 (Ct. Cl. 1971). See also *Pettit* v. *United States*, —— F.2d ——, 6 EPD ¶9036 (Ct. Cl. 1973). See pp. 16a, 17a. The Sixth Circuit, conceding that *Gnotta* and *Chambers* were "irreconcilably in conflict", decided to follow the reasoning of *Gnotta* and the dissenters in *Chambers*. P. 17a.[10] The Court of Claims in *Chambers* declined to follow *Gnotta*, and the dissenting opinions in *Chambers* and *Pettit* pointed out that the majority's opinions were in "direct conflict with *Gnotta*." 451 F.2d at 1081; 6 EPD pp. 6348, 6354-55.

Similarly, although the Sixth Circuit concluded that no civil actions could be maintained other than under section 717(c) to remedy unlawful federal employment discrimination, the Fifth Circuit has on three occasions held that the remedy of mandamus may be invoked when section 717(c) does not afford a remedy. In *Beale* v. *Blount*, 461 F.2d 1133 (5th Cir. 1972), the Fifth Circuit held

> Traditionally, the procedural avenue to reinstatement for an ex-employee of the federal government claiming to be the victim of improper discharge has been a petition for mandatory injunction or writ of mandamus directed to the head of the agency concerned commanding the re-employment of petitioner. . . . In 1962, Congress broadened the availability of the mandamus remedy by investing the district courts generally with jurisdiction to issue the writ which eliminated the previous requirement that reinstatement suits be maintained only in the United States District Court for

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[10] The District Court and the United States below agreed that *Gnotta* and *Chambers* were in conflict. See p. 8a; Brief for Appellee, *Place* v. *Weinberger*, No. 73-2037, p. 7.

> the District of Columbia . . . Title 28 U.S.C., Section 1361. 461 F.2d at 1137.[11]

The Fifth Circuit reaffirmed the availability of mandamus in such cases in *Penn* v. *Schlesinger,* 490 F.2d 700 (5th Cir. 1973), rev'd on other grounds —— F.2d —— (1974), and *Petterway* v. *Veterans Administration,* 8 EPD ¶9437 (1974). The decision of the Sixth Circuit below is in undisputed conflict with *Chambers* v. *United States,* as well as *Pettit* v. *United States, Beale* v. *Blount,* and *Penn* v. *Schlesinger.* Conflicts between a court of appeals and the Court of Claims, like conflicts between courts of appeals, require a grant of writ of certiorari to assure uniformity of decisions in such questions of federal law. See *Waterman S.S. Corp.* v. *United States,* 381 U.S. 252, 258 (1965); *United States* v. *Consolidated Edison Co.,* 366 U.S. 380, 381 (1961).[12] This question is one of continuing importance, since in the future aggrieved federal employees who cannot meet the strict jurisdictional prerequisites of section 717 will seek, as in *Chambers* and *Penn,* to found their actions on other statutes. See e.g. *Brown* v. *General Services Administration,* (2d Cir., No. 73-2628). Although Title VII was enacted to cover private employers a decade ago, employees still rely frequently on such other statutes in employment discrimination litigation.[13]

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[11] Mandamus was denied in *Beale* because the plaintiff had failed to exhaust his administrative remedies. 461 F.2d at 1138-1141. In the instant case, of course, those remedies were exhausted.

[12] The decision of the District Court expressly "declines to follow" the Fifth Circuit decision in *Penn,* p. 8a. Insofar as the decision of the Sixth Circuit held that no judicial remedy exists other than section 717(c) to correct federal employment discrimination, it is in conflict with a variety of district court cases to the contrary. See e.g., *Thorn* v. *Richardson,* 4 EPD ¶7630 (W.D. Wash. 1971) (mandamus); *Palmer* v. *Rogers,* 5 EPD ¶8822 (D.D.C. 1973) (Tucker Act; 28 U.S.C. §1331); *Cortright* v. *Reasor,* 325 F.Supp. 797, 808 (E.D.N.Y. 1971) (28 U.S.C. §1331).

[13] See, e.g., *Sanders* v. *Dobbs Houses, Inc.,* 431 F.2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Young* v. *Inter-*

The decision of the Sixth Circuit is also squarely in conflict with the decision of this Court last term in *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed.2d 476 (May 15, 1974). *Bradley* dealt with the applicability of a new provision authorizing legal fees in school desegregation litigation to cases in which litigation on the merits had ended before enactment of the new statute, but the question of legal fees for that litigation was still pending when the statute became effective. The respondent in *Bradley*, like the Sixth Circuit in the instant case, urged that new statutes should not be applied to events occurring before their enactment absent an express requirement, and that legal fees should not be awarded for litigation completed prior to the effective date of the counsel fee statute.[14] This Court unanimously rejected that approach:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it consider its decision, unless doing so would result in manifest injustice or there is a statutory legislative history to the contrary. 40 L.Ed.2d at 488

Referring to its earlier decision in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969), this Court explained that *Thorpe*

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national Telephone and Telegraph Co., 438 F.2d 737 (3d Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied* 409 U.S. 982 (1973); *Brady* v. *Bristol Myers*, 452 F.2d 621 (8th Cir. 1972); *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970).

[14] The Sixth Circuit held "a law is presumed to operate prospectively unless there is a clear expression to the contrary". P. —a. The respondents in *Bradley* had urged, "the general rule that legislative enactments only operate prospectively absent clear legislative intent to the contrary cannot be seriously questioned." Brief for Respondents, No. 72-2322, p. 10. This use of the term "prospectively" is somewhat inaccurate, since a statute is only "retro-

> stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect. Accordingly we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. 40 L.Ed.2d 490

In applying section 717(c) to discrimination prior to March 24, 1972, the Fourth Circuit in *Koger* v. *Ball*, p. 23a, nn. 14-15 and several district courts have expressly relied on *Thorpe*.[15]

In the instant case the new statute, §717(c), was enacted while petitioner's claim was still pending before the Civil Service Commission Board of Appeals and Review. Having exhausted her administrative remedies, petitioner complied with all the express jurisdictional prerequisites of §717 and commenced this action six months after the statute was enacted. In *Bradley*, by comparison, the litigation for which counsel fees were sought was completed over a year before the new statute went into effect. No claim is or could be made that applying section 717 to the instant case will work any injustice upon the United States.[16] Here, as in

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active" if applied to reopen cases already finally decided. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *Bradley* v. *School Board of The City of Richmond*, 40 L.Ed.2d at 487-88.

[15] *Walker* v. *Kleindienst*, 357 F.Supp. 749, 752 (D.D.C. 1973); *Harrison* v. *Butz*, 5 EPD ¶8632, p. 7892 (D.D.C. 1973); *Jackson* v. *United States Civil Service Commission*, 7 EPD §9134 (S.D. Tex. 1973).

[16] The Sixth Circuit relied on this Court's decision in *Hassett* v. *Welch*, 303 U.S. 303 (1938) for its contention that new statutes should be presumed inapplicable to previously pending litigation. In *United States* v. *Lindsay*, 346 U.S. 568, 571 (1954), this Court explained that *Hassett* was an exception to the rule later reiterated in *Thorpe* and *Bradley* because it involved "particular provisions

Bradley, the legal obligations of the defendants were clear long prior to the new enactment. "The 1972 extension of the Civil Rights Act to government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which had previously existed." *Morton* v. *Mancari*, 41 L.Ed.2d 290, 300 (1974).

The position of the Department of Justice on this question has not been uniform. In the Sixth Circuit the Government argued that section 717(c) did not apply to prior actions of discrimination. In the Second Circuit, however, the United States maintains that section 717(c) does apply to such prior discrimination.[17] In the Fourth Circuit the United States argued that section 717(c) did not apply to discrimination occurring before its effective date, but when the Court of Appeals rejected that position in *Koger* v. *Ball*, the Solicitor General declined to authorize an appeal to this Court. Similarly, the United States now argues that, prior to the 1972 amendments to Title VII, federal employees aggrieved by discrimination had no right to sue in federal court for injunctive relief or back pay. But

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. . . deemed so inequitable and unfair when applied retroactively [sic] that this Court has refused to impute to law making bodies a purpose to bring about such results". Compare *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed.2d at 491-494.

[17] "This argument presumes that the Act applies in the present case as where the complaint, while alleging discrimination occurring before passage of the Act, was filed after the Act became effective. *Hackley* v. *Johnson*, 360 F.Supp. 1247, 1249, n.1 (D.C. 1973), appeal docketed; *Henderson* v. *Defense Contract Administration Services Region*, 7 EPD ¶9058 (S.D.N.Y. 1974), have so held." Brief for the United States in *Brown* v. *General Services Administration*, No. 73-2628, p. 6, n.

in 1971, when Congress was considering enacting legislation to permit such litigation, federal officials repeatedly assured Congress that federal employees already had such a right to sue and that new legislation was unnecessary.[18] Although the United States in the courts below relied heavily on the Eighth Circuit decision in *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), *cert. denied* 397 U.S. 934 (1970), the Civil Service Commission advised Congress that *Gnotta* did not preclude "judicial review of alleged

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[18] "There is also little question in our mind that a Federal employee who believes he has been discriminated against may take his case to the Federal courts after exhausting all of the administrative remedies." Remarks of Irving Kator, Executive Director, United States Civil Service Commission, Hearings Before a Subcommittee of the Senate Committee on Labor & Public Welfare, 92 Cong., 1st Sess. 301 (1971) p. 296. "We believe Federal Employees now have the opportunity for court review of allegations of discrimination, and believe they should have such a right." Id. p. 310, written statement on behalf of the United States Civil Service Commission.

"[T]o some extent injunctive remedies are already available. The constitutionality of any program can be challenged. The authority within the program of an official to act can be challenged." "[T]here is no doubt that a court today may look into unauthorized or unconstitutional agency action . . ." (Remarks of Assistant Attorney General Ruckleshaus) Hearings Before a Subcommittee of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970), pp. 69, 74, 256-257.

In a variety of district court cases the Justice Department has declined to contest the existence of such jurisdiction under provisions other than §717(c). See e.g., *Ballard* v. *Laird*, 6 EPD ¶8793 (S.D. Cal. 1973) (28 U.S.C. §1331); *Jalil* v. *Hampton*, 4 EPD ¶7706 (D.D.C. 1972) (28 U.S.C. §1331); *Sperling* v. *United States*, 7 EPD ¶9274 (D.N.J. 1974) (Tucker Act, 28 U.S.C. §1346); *Waters* v. *Peterson*, 6 EPD ¶8900 (D.D.C. 1973) (Tucker Act, 28 U.S.C. §1346; 28 U.S.C. §1331). The Solicitor General, in federal employment litigation in this Court regarding alleged violations of the Constitution, *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Williams* v. *Zuckert*, 371 U.S. 531 (1963), statutes, *Cole* v. *Young*, 351 U.S. 536 (1956) and regulations, *Service* v. *Dulles*, 354 U.S. 363 (1957), has also declined on repeated occasions to contest the jurisdiction of the Court.

discriminatory action." Hearings Before the Subcommittee on Labor of the House Committee on Education and Labor, 92nd Cong., 1st Sess. 386 (1971). Although the Court of Claims has twice asserted jurisdiction over federal employment discrimination despite *Gnotta,* the Solicitor General declined to seek review of those decisions by this Court. See *Chambers* v. *United States,* 451 F.2d 1045 (Ct. Cl. 1971); *Pettit* v. *United States,* 6 EPD ¶9036 (Ct. Cl. 1973).

At stake in this litigation is the efficacy of the judicial remedy which Congress sought to create when it enacted section 717 to eradicate discrimination on the basis of race or sex. It is now 7 years since petitioner was last promoted, 3 years since petitioner filed her administrative complaint, and over two years since Congress adopted section 717. Throughout this period discrimination on the basis of sex has been indisputably illegal. Because this case, as most, involves continuing acts of discrimination, the Sixth Circuit suggested that petitioner's sole remedy was to recommence at the very beginning her administrative complaint, bringing the same charges to the same supervisors, hearing officer and Board of Appeals and Review which rejected them in 1971 and 1972. Only when those administrative remedies have been re-exhausted will petitioner, and other plaintiffs similiarly situated, be eligible to seek judicial relief. Such a construction of section 717 is more likely to exhaust aggrieved employees than to carry out the purposes of the Equal Employment Opportunity Act of 1972. The Congress which adopted that provision was concerned, not only to afford a judicial remedy, but also to end the interminable delays which had characterized such remedies as had existed before 1972.[19]

[19] See Hearings Before a Subcommittee of the House Committee on Education and Labor, 91st Cong., 1st and 2nd Sess., 111-112,

Congress was insistent on adopting new remedies, despite the objections of the executive branch, because six years after it had adopted section 7151 forbidding discrimination in federal employment, few steps had been taken to disestablish the pattern of discrimination which existed in the federal service. Congress made the 1972 Equal Employment Opportunity Act effective as soon as approved, and contemplated that its salutary provisions which have an immediate impact on the problems of discrimination. The rule adopted by the Sixth Circuit—delaying application of section 717 until there are new acts of discrimination, and a new effort to exhaust administrative proceedings—will necessarily postpone for several years the effect of that provision and thus postpone the elimination of discrimination on the basis of race or sex in federal employment.

The decision of the Sixth Circuit also severely limits the power of the federal courts to remedy continuing acts of discrimination. Although an aggrieved employee could sue if that discrimination continued past the effective date of section 717, the rule adopted by the Sixth Circuit would prevent the employee from obtaining back pay for the wages unlawfully denied to him or her prior to March 24, 1972. Similarly, while the courts could usually order that an aggrieved employee be accorded the seniority which he or she would have had in the absence of discrimination, in the Sixth Circuit a federal employee cannot be deemed to have been hired or promoted before March 24, 1972, even though the unlawful discrimination may have occurred years before. The number of years a federal employee is deemed to have in grade determines the employee's salary,

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118, 147-149, 157, 176-180, 238-240 (1969-70). Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess., 206, 212, 276 (1971).

5 U.S.C. §§5332, 5335, the employee's right to a career appointment, 5 U.S.C. §3304a, the employee's right to retain his or previous salary if reduced in grade, 5 U.S.C. §5337, and the level of the employee's retirement annuity life insurance, and unemployment compensation. 5 U.S.C. §§8339, 8341, 8501, 8704. The date on which a federal employee is deemed to have been hired determines the employee's rights in the event of a layoff, 5 U.S.C. §3502, the amount of the employee's annual leave, 5 U.S.C. §6303, and the employee's eligibility for an annuity and disability retirement. 5 U.S.C. §§8336, 8337. If, as the Sixth Circuit has held, the courts cannot remedy discrimination occurring before March 24, 1974, employees like petitioner who were subject to discrimination before that date will continue to suffer from the effects of that discrimination for the rest of their careers in the federal service.

Petitioner maintains that jurisdiction over this action exists under section 717(c) of Title VII, as well as under 28 U.S.C. §1331, 28 U.S.C. §1346, 28 U.S.C. §1361 and the Administrative Procedure Act, 5 U.S.C. §§703-706, and that the decision of the Sixth Circuit was clearly erroneous. Although the instant case is one involving discrimination on the basis of sex, the decision of the Sixth Circuit, like that revised in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), will also impede the eradication from federal employment of discrimination on the basis of race, color, religion or national origin.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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Opinion of the District Court

PRATT, D.J.

Plaintiff filed this complaint on September 13, 1973. (Docket Entry 1). The complaint alleges that the plaintiff has been discriminated against in her employment by certain federal officers. (Complaint at ¶¶ 8, 9, 10, 11 & 12). These discriminatory acts apparently occurred before September 24, 1971 since plaintiff filed a formal complaint with the defendant on that date. (Complaint at ¶ 3). After appeal to the Board of Appeals and Review on March 31, 1972 and an adverse decision of that body (Complaint at ¶ 6), plaintiff filed this suit. Plaintiff concedes that this civil action is brought pursuant to 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp.) (Complaint at ¶ 7), and that this section was enacted on March 24, 1972. (Complaint at ¶ 3).

Defendant moves to dismiss and for summary judgment. (Docket Entry 17). Defendant argues that sovereign immunity bars this suit since the alleged discrimination occurred prior to the enactment of 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp.) on March 24, 1972.

SOVEREIGN IMMUNITY

The Court determines that the doctrine of sovereign immunity bars this suit since the alleged discrimination of which the plaintiff complained to the United States Civil Service Commission occurred prior to the enactment of 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp.).

42 U. S. C. A. § 2000e-16 (1970-1972 Supp.), for the first time in the history of the Republic, explicitly permits a federal employee to sue her employer for alleged sexual discrimination. That provision was enacted on March 24, 1972. The issue the Court must decide is whether that

provision permits the institution of a civil suit for alleged discriminatory acts that occurred prior to the passage of the act but were not completely processed administratively until after the passage of the amendatory provision. The statute and the legislative history are silent on this precise issue; however two federal district courts have addressed themselves to it.

TITLE VII NOT RETROACTIVE

Freeman v. *Defense Construction Supply Center,* Civil No. 72-241 (S. D. Ohio, filed October 17, 1972) [5 EPD ¶ 8526], held that the 1972 amendment only applied to personnel action occurring after the amendments and not to personnel actions occurring prior to the enactment of the amendments. *Mosley* v. *United States,* Civil No. 72-380-S (S. D. Calif., filed January 23, 1973) [6 EPD ¶ 8875], also held that the 1972 amendments do not apply to personnel actions occurring prior to the enactment of the amendments and that the amendments are not retroactive. Thus, the only case authority presented to the Court on this issue suggests that the defendant is entitled to a dismissal of the civil action for want of subject matter jurisdiction.

Underlying policy and judicial principles also counsel the dismissal of this civil action for want of subject matter jurisdiction. As previously noted, neither the language nor legislative history of Section 2000e-16 addresses itself to the issue of the retroactivity of the section. *United States* v. *Sherwood,* 312 U. S. 548 (1941), teaches, however, that waivers of sovereign immunity should be strictly construed. Thus, *Sherwood* suggests by analogy that any doubts concerning the scope of Section 2000e-16 should be decided in favor of prospective application only.

Another doctrine suggests that any question of the scope of Section 2000e-16 should be decided *in favor of only* prospective application. *Hassett* v. *Welch*, 303 U. S. 303 (1938), establishes the principle that statutes are held to be the prospective in application unless the Congress indicates otherwise. There is no indication that Congress intended Section 2000e-16 to apply retroactively to alleged discrimination that occurred before March 24, 1972. Therefore, the presumption is once again that Congress only intended Section 2000e-16 to apply to discriminatory acts that occurred after March 24, 1972.

The principles of statutory construction mentioned above apply when the text and legislative history of the statute is neutral on the question of the retroactive application of the statute. If any inference can be drawn from the present statutory scheme, it is that Congress did not intend Section 2000e-16 to apply to discriminatory acts that occurred prior to March 24, 1972. Section 2000e-16 was Section 11 of Public Law 92-261. Section 14 of Public Law 92-261 provided that amendments made by the act to Section 706 (that section dealing with the power of the Commission to prevent unlawful employment practices) were applicable to both pending and future charges. Thus, Congress dealt with the problem of retroactivity when it felt that retroactive application of the amendments was necessary. Absence of language similar to Section 14 in Section 11 suggests that Congress did not feel that such retroactive application was merited. It would be most improper for a court to overturn this congressional determination of the importance of retroactivity.

CONTINUING BIAS CLAIM

Plaintiff still maintains that the doctrine of sovereign immunity is inapplicable to her Section 2000e-16 claim. Plaintiff argues that the complaint is aimed at the continuing policy of sexual discrimination within the Food and Drug Administration even though acts prior to March 24, 1972 are utilized as evidence to support this conclusion. Plaintiff cites numerous cases, including *United States* v. *Bethlehem Steel Corp.*, [3 EPD ¶ 8257] 446 F. 2d 652 (2d Cir. 1971); *United States* v. *Sheet Metal Workers Union 36*, [2 EPD ¶ 10,083] 416 F. 2d 123 (8th Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, [1 EPD ¶ 9843] 279 F. Supp. 505 (E. D. Va. 1968); *Williams* v. *St. Gobain Corp.*, 447 F. 2d 561 (10th Cir. 1971); *United States* v. *Electrical Workers No. 38*, [2 EPD ¶ 10,242] 428 F. 2d 144 (6th Cir. 1970), cert. den. 400 U. S. 943 (1970); *Culpepper* v. *Reynolds Metals Co.*, [2 EPD ¶ 10,138] 421 F. 2d 888 (5th Cir. 1970); *Griggs* v. *Duke Power Co.*, [3 EPD ¶8137] 401 U. S. 424 (1970); and *United States* v. *Carpenters Local 169*, [4 EPD ¶ 7610] 457 F. 2d 210 (7th Cir. 1972), for the proposition that the present consequences of past discrimination are covered by the Civil Rights Act of 1964. The Court recognizes this principle. The plaintiff, however, objects in her complaint to the past consequences of past discrimination. The acts and consequences of sexual discrimination of which plaintiff complains in her complaint occurred prior to September 24, 1971. (Complaint at 5). Plaintiff has never presented the claims allegedly occurring subsequent to the enactment of the 1972 amendments to the Food and Drug Administration as is required by 42 U. S. C. A. § 2000e-16(c) (1970-1972 Supp. Pamphlet). (Complaint at ¶ 12). This is not a case where an employee claims that an employment prac-

tice neutral on its face is utilized after the passage of the Act to continue a practice of discrimination enforced prior to the passage of the Act; rather, this is a case where both the allegedly neutral employment practice and the preceding discriminatory act occurs prior to the passage of the 1972 amendments. None of the above cited cases stand for the proposition that the 1972 amendments erase the defense of sovereign immunity when the plaintiff has not exhausted her administrative remedies with respect to practices occurring after the passage of the amendments.

EXECUTIVE ORDER 11478

Plaintiff asserts as another jurisdictional ground for her complaint (besides Section 2000e-16), Executive Order 11478. Plaintiff cites *Chambers* v. *United States* [4 EPD ¶ 7538] 451 F. 2d 1045 (Ct. Cls. 1971), for the proposition that this Court has subject matter jurisdiction pursuant to that Executive Order to compel federal agents to comply with the policy of equal employment opportunities of the 1964 Civil Rights Act. A simple answer to plaintiff's argument is that her entire complaint is premised upon 42 U. S. C. A. § 2000e-16 (1970-1972 Supp. Pam.) as providing the Court with subject matter jurisdiction and a claim for which relief can be granted. (Complaint at ¶¶ 3 and 7). Another simple answer is that *Chambers,* a case involving a discriminatory refusal to hire, distinguished refusal to promote cases such as the present case and *Gnotta* v. *United States,* [2 EPD ¶ 10,078] 415 F. 2d 1271 (8th Cir. 1969), cert. den. [2 EPD ¶ 10,178] 397 U. S. 934 (1970), from its holding and that *Chambers* was based in part on the Court of Claim's unique power over federal employment claims, 451 F. 2d at 1052. The more appropriate and compelling

answer, however, is that *Gnotta* is more persuasive than *Chambers* on any point that those cases may be in conflict concerning subject matter jurisdiction. Mr. Gnotta filed a civil action in district court alleging that his federal employer had denied him a promotion because of his Italian ancestry. The Circuit Court, through Judge (now Justice) Blackmun, affirmed the dismissal of the complaint for want of subject matter jurisdiction even though the plaintiff relied upon an executive order similar to the one in the present case to provide the court with subject matter jurisdiction:

> [W]e adopt Judge Oliver's comments:
>
> "The plaintiff does not allege that his alleged cause of action was created or authorized by any particular provision or section of the Constitution, Act of Congress, [or] regulation of any executive department. Nor does he allege what sort of an express or implied contract he attempts to base his claim. None of the executive orders or regulations which the complaint cites purports to confer any right on an employee of the United States to institute a civil action for damages against the United States, in the event of their violation, even if it should be established that plaintiff's failure to have been promoted as an employee of the Corps of Engineers was in fact due to discrimination in violation of the Executive Orders pleaded. Congress has complete power either to create or to refuse to create such a remedy. It did not authorize civil actions for damages under any of the laws (including the Executive Orders and regulations) applicable to facts pleaded by plaintiff in this case."

415 F. 2d at 1278.

It was no doubt partly in response to *Gnotta* that Congress enacted the 1972 amendments so that federal employees could have judicial redress for discriminatory acts occurring after March 24, 1972. (Cramton, Nonstatutory Review of Federal Administrative Action—The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 387, 391 (1970). Absent an explicit command from Congress that the amendments apply to discriminatory acts and consequences that occurred prior to the enactment of the amendments, *Gnotta* mandates that this Court lacks subject matter jurisdiction over any claim, be it premised on Section 2000e-16 or on inherent judicial authority.

"Unconstitutional" Acts of Officials

Plaintiff also argues that the doctrine of sovereign immunity is inapplicable since the suit is against an officer exercising his powers in an unconstitutional manner, *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682 (1949). The complaint contains no allegation that defendants' actions were unconstitutional; rather, the allegation is that the alleged acts violated the amendments to the Civil Rights Act of 1964 for which plaintiff is suing the head of the employing agency as is required by 42 U. S. C. A. § 2000e-16(c). The only suggestion that the FDA made on unconstitutional use of its powers appears in plaintiff's brief. Even then she alleges that the FDA's unconstitutional use of power is a matter of proof. (Brief at 9). Furthermore, this argument was rejected in *Gnotta* since the decision to promote directly affects the Treasury and involves administrative discretion in the sensitive area of personnel administration:

> "These principles, we feel, operate to identify the first and second counts against the named individuals with counts against the United States, for relief under the counts would compel those individuals to promote the plaintiff, with the natural effect a promotion has upon the Treasury, and to exercise administrative discretion in an official personnel area. This obviously is not a case which concerns either of the exceptions recognized . . . namely, where the officer's act is beyond his statutory power or where, although the action is within the scope of his authority, the power, or the manner of its exercise, is constitutionally void."

415 F. 2d at 1277.

The Court declines to follow *Penn* v. *United States,* [5 EPD § 8404] 350 F. Supp. 752, 755 (M. D. Ala. 1972) and cannot agree with the distinctions of *Gnotta* made therein. *Gnotta* did not evaluate the merits of the claim. The Court in *Gnotta* assumed plaintiff could prove that he was discriminated against because of ancestry, 415 F. 2d at 1276. *Gnotta* held that the supervisor discretion necessary for departmental promotion foreclosed the allegation that the discretion was exercised unconstitutionally, 415 F. 2d at 1276. (The Court does note, however, that any contradiction between *Penn* and *Gnotta* will be minimized by Section 2000e-16 since Courts will not have to engage in contortions of the *Larson* doctrine in order to redress egregious acts of discrimination occurring after March 24, 1972).

Ogletree v. *McNamara,* [4 EPD ¶ 7510] 449 F. 2d at 93 (6th Cir. 1971), also counsels against the adoption of the *Penn* rationale. *Ogletree* was a civil action by federal Negro employees of the Wright Patterson Air Force Base that

alleged systematic racial discrimination in the merit promotion program. The Court held that *Gnotta* precluded the suit against the individual defendants:

> "The operation of our defense establishments is, of course, close to the core of the concept of sovereign immunity. Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 704, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that defendants are all named as individuals does not change the result. *Larsen* v. *Domestic & Foreign Corp., supra; Dugan* v. *Rank,* 372 U. S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *Hawaii* v. *Gorden,* 373 U. S. 57, 83 S. Ct. 1052. 10 L. Ed. 2d 191 (1963)."

449 F. 2d at 100.

Ogletree provided, however, that the plaintiffs could seek judicial review of complaints specifically alleging exhaustion of administrative remedies, see also *Beale* v. *Blount,* 461 F. 2d 1133 (5th Cir. 1972). *Virgil* v. *Post Office Dept.,* 406 F. 2d 921 (10th Cir. 1969), limits that judicial review to a determination of whether the procedural requirements of the statutes and regulations were complied with and whether the action of the department officials was arbitrary or capricious or not supported by substantial evidence.

Dismissal of Action

Ogletree and *Gnotta* therefore mandate that this civil action be dismissed without prejudice for lack of subject

matter jurisdiction. Since the dismissal is without prejudice, plaintiff is not precluded from seeking judicial review of final administrative action as is permitted by *Ogletree*.

It Is So Ordered.

Opinion of the Sixth Circuit Court of Appeals

CONTIE, *D.J.*:

The plaintiff-appellant, a female employed in the Pure Food and Drug Administration, filed a complaint in Federal District Court on September 13, 1972, alleging she was discriminated against because of her sex in the following respects:

(a) Her request for promotion had not been acted upon as rapidly as those of men similarly situated;

(b) She was being denied administrative leave of compensatory time for attending graduate level classes for job-related training while men similarly situated were granted such time;

(c) She was being denied compensatory leave or overtime pay for work accomplished outside of official duty hours while men similarly situated were granted such time; and

(d) She was unable to obtain details within her agency for the purpose of on-the-job training and for the purpose of advancement, although male employees had obtained such information.

Previously, plaintiff-appellant had filed a formal complaint with defendant-appellee Equal Employment Opportunities Commission (hereinafter E.E.O.C. or defendant-appellee) on September 24, 1971. Said administrative complaint was denied for failing to show discrimination. An appeal was taken to the Board of Appeals and Review, which affirmed the findings of the E.E.O.C., said affirmation being made

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* The Honorable Leroy J. Contie, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

after the date of the adoption of Title 42 U.S.C. 2000e-16(c). Plaintiff thereafter filed the instant cause of action in District Court.

Plaintiff-appellant assets that her federal court action is brought pursuant to Title 42 U.S.C. 2000e-16(c) which was enacted March 24, 1972, approximately six months after the filing of the formal administrative complaint. The United States District Court was thus confronted with a complaint filed after the enactment of 2000e-16(c), but resulting from a formal administrative complaint which was filed before said enactment.

RETROACTIVITY OF TITLE VII

It is the claim of the plaintiff appellant that jurisdiction of the federal court claim is based upon Title 42 U.S.C. 2000e-16(c) and/or on Executive Order 11478.

Defendant-appellee, asserting that the federal court did not have jurisdiction under either 2000e-16(c) or the Executive Order, filed a motion to dismiss or in the alternative for summary judgment in the district court. On July 5, 1973, the United States District Court sustained defendant-appellee's motion for summary judgment. The District Court determined that the defense of sovereign immunity was applicable and that Title 42 U.S.C. 2000 e-16(c) did not apply retroactively. The Court further found that Executive Order 11478 did not give plaintiff-appellant subject matter jurisdiction. In argument before this Court plaintiff-appellant contends that Title 42 U.S.C. 2000e-16(c) should be applied retroactively.

The District Court characterized Title 42 U.S.C. 2000 e-16(c) as the creation of new rights formerly barred under the doctrine of sovereign immunity. Plaintiff-appellant asserts that in view of the facts that the E.E.O. Act of

1972 does not contain a statement as to how said Act should be applied and since the purpose of the Act is remedial in nature, said Act should therefore be given retroactive effect. In the alternative, plaintiff-appellant contends that the District Court has jurisdiction of her claim by reason of the Civil Rights Act of 1964. In support of this alternative claim the plaintiff-appellant cites the case of *Davis* v. *Washington*, [5 EPD ¶ 8088] 352 F.Supp. 187 (Dist. Ct. D.C. 1972).

This Court first notes that the Civil Rights Act of 1964 did not grant the courts jurisdiction over litigation involving federal employees.

Further, the *Davis* case is totally distinguishable. In that case the District Court for the District of Columbia was attempting to determine whether a police force promotional test was discriminatory in effect. The court therein stated that:

"While strictly speaking, the claims raised here by plaintiffs against these governmental employers were not governed by Title VII of the 1964 Civil Rights Act until it was recently amended[1], the Court, as the parties basically agree, looks to the Act . . . for guidance as to the constitutional constraints on a public employer."

We agree that the claims raised by plaintiff-appellant are not governed by Title VII of the Civil Rights Act of 1964.

We also agree that the *Davis* case does not stand for the proposition that Title VII grants federal courts jurisdiction in sex discrimination cases. A careful reading of that case indicates that the court therein did not find jurisdiction under either Title VII of the Civil Rights Act or the E.E.O.

[1] Equal Employment Opportunity Act of 1972, Pub.L. No. 86 Stat. 103 (March 24, 1972).

Act of 1972. Rather, that court determined that having taken jurisdiction, it would look to the above mentioned acts for guidance and guidelines. *Davis* v. *Washington, supra,* at 191. Thus, we conclude that the *Davis* case is distinguishable and that the District Court does not have jurisdiction of plaintiff-appellant's claim under the Civil Rights Act.

Turning to the issues of sovereign immunity and the retroactive application of the E.E.O. Act of 1972, this Court is convinced that the District Court properly granted defendant-appellee's motion for summary judgment on the grounds of the applicability of the doctrine of sovereign immunity. The law in this area is clear.

Waivers of sovereign immunity must be strictly construed. *United States* v. *Sherwood,* 312 U.S. 584, 61 S.Ct. 767 (1941). Furthermore, a law is presumed to operate prospectively unless there is a clear expression to the contrary. *Hassett* v. *Welch,* 303 U.S. 303, 58 S.Ct. 559 (1938). An examination of Section 14 and Section 11 of the E.E.O. Act of 1972 indicates that Congress provided that said Act "shall be applicable in regard to charges pending before the Commission." Thus, Congress clearly intended certain portions of the Act to operate retroactively and so indicated. We therefore conclude that by its silence as to other sections Congress intended such sections to have prospective application only. In support of this conclusion we note that the District Court relied upon *Mosley* v. *United States,* Civil 72-380-S (January 4, 1973 S.D. Calif.) [6 EPD ¶ 8875] and *Freeman* v. *Defense Construction Supply Center,* C 72-241 (S.D. Ohio Filed October 17, 1972) [5 EPD ¶ 8526] in which the Act was held not to apply retroactively. We are convinced that this conclusion is sound.

The plaintiff-appellant relies upon *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) [5 EPD ¶ 8594] wherein the Court stated that the 1972 Act was remedial and amendatory and that the Act should be construed to cover pending charges of discrimination in federal employment. The District Court in the *Walker* case further stated that said Act takes away no substantive right, but merely changes the tribunal that is to hear the case. However, this Court cannot agree with this conclusion. See *Freeman* v. *Defense Construction Supply Center, supra; Johnson* v. *Froehlke*, C.A. 72-677(H), (D. Md. Jan. 4, 1973) [5 EPD ¶ 8638].

ADMINISTRATIVE REMEDIES

The District Court in the instant case further determined that the plaintiff-appellant had not exhausted her administrative remedies relative to acts which occurred after the enactment of Title 42 U.S.C. 2000 e-16(c) and that, therefore, plaintiff-appellant's action was barred by reason of her failure to exhaust her administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459 (1938). Plaintiff-appellant asserts that the requirement of exhaustion of administrative remedies should not apply when the exercise of such remedies would be futile. *Ogletree* v. *McNamara*, [4 EPD ¶ 7510] 449 F.2d 93 (C.A. 6 1971). In support of this argument, plaintiff-appellant contends that her claim is one of continuing discrimination and that the issues already presented to the EEOC are "nearly" identical. Therefore, she concludes that the futility principle of *Ogletree* is applicable.

However, this Court is of the opinion that by the statement in the complaint alone, it must be assumed there are new acts of discrimination. Such new acts may be similar

in nature, but could hardly be precisely identical in all respects. A claimant cannot avoid a requirement of the Act by the self-serving determination that the new facts are similar to prior alleged discriminatory acts, and that accordingly the same result would excuse her from administrative review. The facts as alleged by the plaintiff-appellant in her brief are not identical but, in her own words, are "nearly identical".

The plaintiff-appellant relies upon *Griggs* v. *Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424, 91 S.Ct. 849 (1970), to buttress her argument that the alleged acts are continuing violations and therefore are exempt from administrative procedures. The *Griggs* case is clearly distinguishable in that it does not involve sovereign immunity and was decided March 8, 1971. Further, said case was based upon acts of a private employer and the violation of Title VII of the Civil Rights Act of 1964. See *United States* v. *Carpenters Local 169*, [5 EPD ¶ 8030] 457 F.2d 210 (C.A. 7 1972), and *United States* v. *Virginia Electrical and Power*, [3 EPD ¶ 8207] 327 F.Supp. 1034 (E.D. Va. 1971). These cases do not relate to the issue of sovereign immunity prior to the 1972 enactment of the E.E.O. Act.

Executive Order 11478

Plaintiff-appellant's final contention is that Executive Order 11478 confers subject matter jurisdiction on the District Court. However, we conclude that said Executive Order does not contemplate judicial review. In the case of *Gnotta* v. *United States*, [2 EPD ¶ 10,078] 415 F.2d 1271 (C.A. 8 1969), which was cited by this Court in *Ogletree, supra*, Judge (now Justice) Blackman ruled that Executive Orders 11246 and 10925, the predecessors of 11478, did not provide for a judicial review by civil action. The plaintiff-appellant however relies upon *Chambers* v. *United States*,

[4 EPD ¶7538] 451 F.2d 1045 (U.S.Ct.Cl. 1971), in which the court therein concluded that inasmuch as Congress did not exclude a judicial review, one should have been contemplated.

It must be unequivocally stated that *Gnotta* and *Chambers* are irreconcilably in conflict. The Court has difficulty in applying the *Chambers* reasoning that by failing to contain expressions of exclusion that the Congress intended that there be review. We prefer the dissent of the *Chambers* case wherein the Court stated that the Court did not have jurisdiction and that no statute of Congress granted any right in favor of anyone against the United States. We therefore conclude that Executive Order 11478 does not provide subject matter jurisdiction to plaintiff-appellant.

For the reasons stated above, the judgment of the District Court is affirmed.

Opinion of the Fourth Circuit Court of Appeals in *Koger* v. *Ball*

BUTZNER, C.J.

The narrow question presented by this appeal is whether a federal employee whose complaint of racial discrimination was pending administratively on March 24, 1972, the effective date of the Equal Employment Opportunity Act of 1972,[1] may seek judicial redress. The district court, ruling that it lacked subject matter jurisdiction to hear a complaint alleging discrimination that occurred before the effective date of the Act, and alternatively, that the complaint failed to state a claim on which relief can be granted, dismissed the employee's suit.[2] We hold that the procedural provisions of the Act embrace those complaints that were being administratively considered at the time of its enactment. Accordingly, we reverse and remand the case for further proceedings.

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[1] Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972), 42 U.S.C. § 2000e *et seq.* (1972).

[2] Other courts reaching the same conclusion include: *Hill-Vincent* v. *Richardson*, [5 EPD ¶ 8639] 359 F.Supp. 308 (N.D. Ill. 1973); *Freeman* v. *Defense Constr. Supply Center*, [5 EPD ¶ 8526] 5 FEP Cases 505 (S.D. Ohio 1972); *Moselv* v. *United States*, [6 EPD ¶ 8875] 6 FEP Cases 462 (S.D. Cal. 1973); *Palmer* v. *Rogers*, [6 EPD ¶ 8822] 6 FEP Cases 892 (D.D.C. 1973).

In contrast, however, a majority of the courts considering the problem have applied the Act retrospectively: *Walker* v. *Kleindienst*, [5 EPD ¶ 8594] 357 F.Supp. 749 (D.D.C. 1973); *Hackley* v. *Johnson*, [6 EPD ¶ 8725] 360 F.Supp. 1247 (D.D.C. 1973); *Johnson* v. *Froehlke*, [5 EPD ¶ 8638] 5 FEP Cases 1138 (D.Md. 1973); *Pointer* v. *Sampson*, [5 EPD ¶ 8610] 6 FEP Cases 9 (D.D.C. 1973); *Harrison* v. *Butz*, [5 EPD ¶ 8632] 6 FEP Cases 109 (D.D.C. 1973); *Grubbs* v. *Butz*, [6 EPD ¶ 8783] 6 FEP Cases 432 (D.D.C. 1973); *Henderson* v. *Defense Contract Admin. Region*, [7 EPD ¶ 9058] 7 FEP Cases 741 (S.D.N.Y. 1973); *Johnson* v. *Lybecker*, [7 EPD ¶ 9191] FEP Cases 279 (D. Ore. 1974); *Gautier* v. *Weinberger*, [6 EPD ¶ 9001] 7 FEP Cases 473 (D.D.C. 1973).

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Factual Background

I. The procedural background of this case and the facts pertinent to this appeal can be briefly stated. At all relevant times, Executive Order 11478 and its supplemental regulations were in effect. The Order reiterates the government's policy of assuring persons of all races equal opportunity to federal employment. In addition to encouraging the resolution of grievances on an informal basis, the President directed the Civil Service Commission and each department to provide for the prompt and impartial consideration of complaints of discrimination.[3]

On November 30, 1971, the appellant, O'Neal W. Koger, applied for a better paying position in the Social Security Administration where he was employed. After discovering he had not been selected for the post, he lodged a complaint alleging that he had been denied promotion because of his race. On February 22, 1972, as the first step in the grievance procedure prescribed by the regulations, he wrote a letter to the director of the bureau where he worked.[4] The director denied relief and suggested that if Koger wished to pursue his complaint he should contact an equal oppor-

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[3] Exec. Order 11478 became effective on August 7, 1969, 3 C.F.R. 803 (1966-1970 Comp.), 42 U.S.C. § 2000e note (1970). The Civil Service Regulations which implemented the Order became effective on January 1, 1971. 5 C.F.R. § 713.201 *et seq.* (1971).

The preamble to the Order states:

"It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality."

[4] Exec. Order 11478, § 4; 5 C.F.R. §§ 713.212(a) and 771.303(a) (1971).

tunity employment counselor.[5] The conferences with the counselor proved futile, so on April 28, 1972, Koger submitted a formal complaint to the Secretary of the Department of Health. Education and Welfare.[6] Since no action had been taken on the complaint by November 17, 1972, Koger's lawyer made an inquiry to the Department. On December 4, 1972, the assistant general counsel replied that the complaint was still under review, but he added that Koger could now file a civil action without further notification from the Department. Accordingly, Koger, having waited 180 days from the institution of his complaint without receiving a decision, filed this action under the 1972 Act, which had become effective the previous March while he was pursuing his administrative remedies.

APPLICABILITY OF TITLE VII

II. Although the federal government has long barred its departments and agencies from discrimination against their employees on the ground of race, judicial enforcement of this policy was uncertain and ineffective before 1972.[7] To

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[5] 5 C.F.R. §§ 713.213 and 771.303(b)(2) (1971).

[6] Exec. Order 11478, § 4; 5 C.F.R. § 771.309 (1971).

[7] *See generally, Walker* v. *Kleindienst*, [5 EPD ¶ 8594] 357 F.Supp. 749, 751 (D.D.C. 1973) (dictum).

The legislative history of the 1972 Act discloses Congress' concern with the problem.

"The prohibition against discrimination by the Federal Government, based upon the due process clause of the fifth amendment to the Constitution, was judicially recognized long before the enactment of the Civil Rights Act of 1964. [*Bolling* v. *Sharpe*, 347 U.S. 497 (1954)] And Congress itself has specifically provided that it is 'the policy of the United States to insure equal employment opportunities for Federal employees without discrimination

remedy this situation, Congress amended Title VII of the Civil Rights Act of 1964[8] by the Equal Opportunity Act of 1972,[9] which among other provisions, added a new section pertaining to government workers.[10] This section emphasizes that federal employment shall be "free from any discrimination based on race, color, religion, sex, or national origin." It refines the responsibilities and administrative procedures necessary for the departments, agencies, and Civil Service Commission "to maintain an affirmative program of equal employment opportunity," and it negates any intention to relieve government officials of their existing responsibilities "as required by the Constitution. . . . statutes [and] Executive Order 11478." Bearing directly on this case, it provides in § 717(c) that after an aggrieved employee has exhausted his administrative remedies on a complaint brought pursuant to Executive Order 11478, he

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because of race, color, religion, sex, or national origin. . . .' [5 U.S.C. § 7151 (Supp. II 1965, 1966)].

"The primary responsibility for implementing this stated national policy has rested with the Civil Service Commission, pursuant to Executive Order 11246 (1964) as clarified by Executive Order 11748.

"Despite some progress that has been made in this area, the record is far from satisfactory. Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels." H.R. Rep. No. 92-238, 92d Cong., 2d sess. (1972), 2 U.S. Code Cong. & Admin. News 2137, 2157 (1972).

[8] Pub. L. No. 88-352, 78 Stat. 253 (July 2, 1964), 42 U.S.C. § 2000e *et seq.* (1972).

[9] *See* n.1, *supra.*

[10] The Equal Employment Opportunity Act of 1972 § 717, 42 U.S.C. § 2000e-16 (1972). All subsequent section references in the text are to the Act.

may file a civil action against the head of his department or agency.[11]

The legislative history establishes that the 1972 Act did not create a new substantive right for federal employees. The constitution, statutes, and executive orders previously granted them the right to work without racial discrimination.[12] Section 717(c) simply created a new remedy for the enforcement of his existing right. Senator Cranston, a proponent of the legislation, explained its function as follows:

"Subsection (c) of the new section 717 creates a remedy in Federal district court—comparable to private employment actions—for any employee who has exhausted the equal employment opportunity complaint procedure within his Federal agency." [13]

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[11] Section 717(c), 42 U.S.C. § 2000e-16(c) (1972), provides:

"Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

[12] *See* nn.3 and 7, *supra*.

[13] 118 Cong. Rec. 2279 (daily ed. Feb. 22, 1972).

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Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment.[14] Of course, retrospective application is not allowed when it will work a manifest injustice by destroying a vested right.[15] But this exception plays no role here because the government has no vested right to discriminate against its employees on the basis of race.[16] The general rule has been applied to cases affected by either the enlargement or the contraction of jurisdiction even though the cause of action arose before the enactment of the statutes that changed the court's jurisdiction.[17] Mr. Justice Holmes succinctly explained why a statute, that "takes away no substantive right but simply changes the tribunal that is to hear the case, should be applied to pending cases." Retrospective application is appropriate when the statute "evinces a

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[14] In *Sampeyreac* v. *United States*, 32 U.S. (7 Peters) 222, 239 (1833), the Court said:

"[C]onsidering the Act . . . as providing a remedy only, it is entirely unexceptionable. It has been repeatedly decided in this court that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed."

See also Thorpe v. *Housing Authority of Durham*, 393 U.S. 268, 281 (1969); *United States* v. *Village Corp.*, 298 F.2d 816, 820 (4th Cir. 1962).

[15] *Greene* v. *United States*, 376 U.S. 149 (1964); *see Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 282 n.43 (1969) (dictum); 2 J. Sutherland, Statutory Construction § 41.09 (4th ed. 1973).

[16] *Walker* v. *Kleindienst*, [5 EPD ¶ 8594] 357 F.Supp. 749, 752 (D.D.C. 1973), *see also* nn.3 & 7, *supra*.

[17] *Federal Reserve Bank of Richmond* v. *Kalin*, 77 F.2d 50 (4th Cir. 1935) (jurisdiction enlarged); *Hallowell* v. *Commons*, 239 U.S. 506 (1916) (jurisdiction withdrawn).

change of policy" arising out of a "consideration [that] applies with the same force to all cases." [18] Though Mr. Justice Holmes spoke of the transfer of jurisdiction from the judiciary to the executive, his reasoning applies precisely to this case where we deal with the transfer of jurisdiction from the executive to the judiciary.

Section 717(c) evinces a congressional policy to make the courts the final tribunal for the resolution of controversies over charges of discrimination after all administrative remedies have been exhausted. This policy applies with equal reason to discrimination that occurred either before or after the passage of the Act when the earlier discrimination was the subject of administrative proceedings at the time of enactment. In both instances, the wrong is similar, and the requirement for exhaustion of administrative remedies is the same.

Section 717(c), read literally, applies to Koger's pending claim. It authorized him to file a civil action against the head of his department because in the language of the statute: 1) his "complaint of discrimination based on race . . . [was] brought pursuant to . . . Executive Order 11478 . . ."; 2) he waited "one hundred and eighty days from the filing of the initial charge with the department agency or unit . . ." before filing suit; and 3) he was "aggrieved . . . by the failure to take final action on his complaint." [19] Koger's complaint, therefore, states a cause of action over which the district court has jurisdiction, unless his suit is barred by an exception to the general rule governing the retrospective application of procedural statutes.

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[18] *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916).

[19] *See* n.11, *supra*.

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OBJECTIONS TO COURT JURISDICTION

III. The government advances three reasons why § 717(c) should not be applied to pending cases of discrimination. It relies primarily on a footnote in Cohen v. Chesterfield County School Board,[20] in which we said, "Rules and practices of [a public school board] in effect when the [board] was exempt from the Equal Employment Opportunity Act cannot be the basis for a violation of that Act."[21] The government contends that since it was similarly exempt until March 1972, Koger's suit, by analogy, cannot be maintained.

Cohen, however, is not controlling. There the issue concerned the validity of a school board's regulation pertaining to maternity leave. For this reason, the court's inquiry was directed to ascertaining the teacher's substantive rights. The corollary of the teacher's right was the obligation placed on the board. Obviously, during the time the board was exempt, the Act placed no obligation on it; consequently, the Act afforded the teacher no complementary right.[22] Because the footnote dealt with the board's duty

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[20] *Cohen* v. *Chesterfield County School Board*, [5 EPD ¶ 8419] 474 F.2d 395-96 n.1 (4th Cir. 1972), [7 EPD ¶ 9072] *rev'd* 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974).

[21] Similar language is contained in a footnote of the Supreme Court's opinion. *Cohen* v. *Chesterfield County School Board*, 42 U.S.L.W. 4186, 4188 n.8 (U.S. Jan. 21, 1974).

[22] Since the Act imposed no duty on the board at the time the teacher was placed on maternity leave, the Court considered her constitutional claim and held that the maternity leave regulation violated the due process clause of the fourteenth amendment. *Cohen* v. *Chesterfield County School Board*, [7 EPD ¶ 9072] 42 U.S.L.W. 4186 (U.S., Jan. 21, 1974).

and the teacher's substantive right, it must be read in this context.

In contrast, Koger's right to be free from racial discrimination does not depend on the 1972 Act. Executive Order 11478 previously imposed a duty on the officials of his department to promote employees without regard to their race. The Act provided Koger a supplementary remedy for a violation of the existing duty defined by the Order. We conclude, therefore, that *Cohen* furnishes no precedent for dismissing Koger's complaint.

The government's second reason for avoiding retrospective application of § 717(c) is based on § 14 of the 1972 Act.[23] This section provides that amendments made to § 706 of the Civil Rights Act of 1964[24] shall be applicable to charges pending before the Economic Opportunity Commission. The government contends that § 14 indicates that only the amendments to § 706 were to be given retroactive effect, and therefore § 717(c) cannot be applied retrospective. In the leading case supporting the government, the court ruled that a federal employee's complaint of pre-Act discrimination failed to state a claim under the 1972 Act.[25] The court reasoned that § 717(c) of the Act created a "new claim" for federal employees. Since § 717(c) is not an

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[23] Section 14, 42 U.S.C. § 2000e-5 note (1972), provides:

"The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

[24] 42 U.S.C. § 2000e-5(a) to (g) (1972).

[25] *Hill-Vincent* v. *Richardson*, [5 EPD ¶ 8639] 359 F.Supp. 308 (N.D. Ill. 1973). The court, however, ruled that the complaint stated a cause of action under the fifth amendment. 359 F.Supp. at 309.

amendment of § 706, the court concluded that the "new claim" was applicable only to post-Act discrimination.

We agree that § 717(c) is not an amendment to § 706, but this does not settle the matter. The difficulty with the government's argument arises out of the failure to analyze the nature of the "new claim" the Act was said to have created. If the phrase means only a new substantive right, it is inaccurate because a federal employee's right to be free from racial discrimination existed before the passage of the 1972 Act. If it includes—as it should—a new remedy to enforce an existing right, then under the general rule favoring retrospective application of procedural statutes, § 717(c) should be applied to pending cases for the reasons mentioned in Part II.

Moreover, we find nothing in the legislative history to justify the inference that by making amendments to § 706 retrospective. Congress intended all other provisions of the Act to be prospective. The 1972 amendments to § 706 enlarged the power of the Economic Opportunity Commission and the Attorney General to deal effectively with discrimination in the private sector.[26] The House bill was silent concerning the application of the new provisions to pending charges against private employers,[27] and the Senate bill originally proposed that they should not be retroactive. However, at the request of the Justice Department, Senator Javits offered an amendment to apply the changes in § 706 to charges pending before the Commission.[28]

[26] 42 U.S.C. § 2000e-5(a) to (g) (1972).

[27] H.R. Conf. Rep. No. 92-899, 92d Cong., 2d sess., 2 U.S. Code Cong. & Admin. News 2179, 2185 (1972).

[28] 118 Cong. Rec. 2183 (daily ed. Feb. 21, 1972).

The Senate, and later the House conferees, accepted Senator Javits' amendment without any discussion about its effect on the rights of federal employees.[29] Therefore, in the absence of any indication that Congress intended to alter the general rule that procedural statutes should be applied retrospectively, the legislative history furnishes no authority for limiting the application of § 717(c) to post-Act discrimination.[30]

Finally, the government claims sovereign immunity, citing Gnotta v. United States,[31] which held that this doctrine was a defense to a complaint similar to Koger's. Assuming for the purpose of the government's argument, that *Gnotta* is correct, we nevertheless find it inapposite. *Gnotta* was decided before the passage of the 1972 Act, and consequently it presented no occasion for considering whether § 717(c) should be applied retroactively to abrogate the doctrine with respect to pending complaints of racial discrimination. Clearly, Congress gave its consent for suits to redress discrimination occurring after passage of the Act. Whether this consent extends to pending cases of pre-Act discrimination depends on the propriety of retrospective application of the Act. Thus, the government's plea of sovereign immunity does not resolve the issue; it simply restates the question in different words.

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[29] *See* nn.27 and 28, *supra*.

[30] "Unless a contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases." 2 J. Sunderland, Statutory Construction § 41.09 at 281 (4th ed. 1973).

[31] *Gnotta* v. *United States*, [2 EPD ¶ 10,078] 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); *accord*, *Manhattan-Bronx Postal Union* v. *Gronouski*, [52 LC ¶ 16,704] 350 F.2d 451 (D.C. Cir. 1965).

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The only condition precedent to suit that Congress created was the exhaustion of administrative remedies, including those remedies that Executive Order 11478 made available both before and after the passage of the Act. Since Koger's pending case satisfied this condition precedent, the express language of § 717(c) authorizes him to seek judicial relief.[32] In this respect, he stands in the same position as an employee who exhausted his administrative remedies for a claim of post-Act discrimination. Therefore, no rational purpose is served by invoking the doctrine of sovereign immunity to bar judicial adjudication of Koger's complaint simply because his pending case involved pre-Act discrimination.[33] We conclude that Congress, being fully aware of the general rule favoring retrospective application of procedural statutes, intended by enacting § 717(c) to grant employees consent to sue for redress of pending cases of pre-Act discrimination.[34]

The judgment is reversed, and the case is remanded for further proceedings.

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[32] *See* n.11, *supra*.

[33] Congressional intention to abolish the defense of sovereign immunity is disclosed in S. Rep. No. 92-415, 92d Cong., 1st Sess. 16 (1971):

"An important adjunct to [administrative] responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

" . . . [T]he committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity . . . The provisions adopted by the committee will [afford] . . . employees . . . the full rights available in the courts as are granted to individuals in the private sector under Title VII."

[34] *Henderson* v. *Defense Contract Admin. Region*, [7 EPD § 9058] 7 FEP Cases 241, 242 (S.D.N.Y. 1973).

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a female employee of the Department of Health, Education and Welfare, challenges the dismissal, for want of jurisdiction, of her suit alleging federal employment discrimination. She claims that Section 717(c) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II, 1972 ed.) 2000e-16c, confers jurisdiction on federal district courts to entertain complaints asserting pre-March 24, 1972 (the effective date of the Act) instances of discrimination where an administrative complaint concerning such discrimination was pending and not finally determined on March 24, 1972.

Petitioner filed an administrative complaint on September 24, 1971, with her agency, alleging that she was discriminated against in her employment because of

her sex. The administrative complaint was denied, and on August 15, 1972, that denial was affirmed by the Board of Appeals and Review of the Civil Service Commission. This action was commenced in federal district court on September 13, 1972.

Petitioner asserted jurisdiction pursuant to Section 717(c) of the 1972 Act, which became effective on March 24, 1972. The district court dismissed the action "for lack of subject matter jurisdiction" (Pet. App. 9a-10a) on the ground that "Congress did not intend Section [717(c)] to apply to discriminatory acts that occurred prior to March 24, 1972" (Pet. App. 3a), such as those alleged by petitioner in her complaint. The court also noted that plaintiff had never presented to the agency claims of employment discrimination allegedly occurring subsequent to the enactment of the 1972 Act (Pet. App. 4a). Accordingly, the dismissal was "without prejudice" (Pet. App. 9a, 10a). The court of appeals, in an opinion reported at 497 F. 2d 412, affirmed on essentially the same grounds.

1. Petitioner urges review by this Court because of a conflict between the decision below and *Koger* v. *Ball,* 497 F. 2d 702 (C.A. 4). The conflict, however, is a narrow one, involving a question which is not of continuing significance.

In *Koger* v. *Ball,* the Fourth Circuit held that Section 717(c) conferred jurisdiction on the district courts to entertain complaints of pre-March 24, 1972 acts of federal employment discrimination where an administrative complaint alleging such discrimination was, like the instant complaint, pending and not finally determined on March 24, 1972. Subsequently, however,

in Clark v. Goode, 499 F. 2d 130 (C.A. 4), that court held that Section 717(c) did not confer jurisdiction on the district courts to entertain complaints of pre-March 24, 1972 acts of discrimination where the administrative complaint was finally determined prior to March 24, 1972. The conflict, therefore, involves only the narrow question of whether the Act confers jurisdiction over complaints alleging pre-March 24, 1972 acts of federal employment discrimination where an administrative complaint was pending and not finally determined on March 24, 1972.[1] This question is not of continuing significance, since a federal employment discrimination suit under Section 717(c) must be commenced "[w]ithin thirty days of receipt of notice of final [agency] action". Accordingly, the government decided not to file a petition for a writ of certiorari in *Koger,* notwithstanding the conflict with the decision below.

Petitioner's contention that the holding below might prevent employees from obtaining back pay for wages unlawfully denied them through discrimination occurring prior to March 24, 1972, but continuing thereafter, also applies only to a narrow category of cases which will not recur, since 42 U.S.C. (Supp. II, 1972 ed.) 2000e-5(g), governing federal employment discrimination suits, specifically provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Oppor-

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[1] *Koger* was decided on May 10, 1974. In rendering its decision here on May 15, 1974, the court below indicated no awareness of *Koger*, and petitioner did not seek a rehearing.

The District of Columbia Circuit has recently adopted the reasoning of *Koger* in *Womack* v. *Lynn*, C.A. D.C., No. 72-1827, decided October 1, 1974.

tunity] Commission." Thus, the Act in any event prohibits the award of back pay for any period prior to March 24, 1972, in suits involving administrative complaints filed on or after March 24, 1974.

2. The district court specifically dismissed petitioner's complaint "without prejudice" in order to permit her to seek judicial review of final action on a properly framed administrative complaint alleging employment discrimination occurring on or after March 24, 1972. Accordingly, the denial of this petition would in no way diminish the remedies available to petitioner under the Act for any alleged discrimination against her since that date.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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IN THE

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SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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OCTOBER TERM, 1974

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SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

Petitioner files this supplemental brief pursuant to Rule 24(5) in support of her Petition for a Writ of Certiorari presently pending before this Court.

The decision of the Sixth Circuit in the instant case is in conflict with the decisions of two courts of appeals issued since the filing of the Petition. The Court of Appeals for the District of Columbia in *Womack* v. *Lynn*, 8 EPD ¶ 9709 (October 1, 1974), held that section 717 of the 1964 Civil Rights Act does apply to discrimination occurring prior to March 24, 1972, the date on which that section became law. In the instant case the Sixth Circuit reached the opposite conclusion. Petition, pp. 12a-15a. In *Bowers* v. *Campbell* (No. 72-1273) (October 24, 1974), the Ninth Circuit upheld federal jurisdiction to hear claims of discrimination in federal employment, even though section 717 was inapplicable, a position rejected

by the Sixth Circuit below. Petition, pp. 15a-17a.[1] Two new district court opinions have been reported reaching opposite conclusions as to whether section 717 applies to discrimination prior to March 24, 1972. *Day* v. *Weinberger*, 8 EPD ¶ 9646 (D.D.C. 1974); *Willingham* v. *Lynn*, 8 EPD ¶ 9618 (E.D. Mich. 1974).

The decision in *Womack* is of particular importance. The government, in opposing Certiorari, argues that the admitted conflict between the circuits is a narrow one because the Fourth Circuit, while applying section 717 to discrimination prior to March 24, 1972, may limit that rule to cases in which the final administrative determination occurred after March 24, 1972. Memorandum for Respondents in Opposition, pp. 2-3. See *Koger* v. *Ball*, 497 F.2d 702 (4th Cir. 1974); *Clark* v. *Goode*, 499 F.2d 130 (4th Cir. 1974).[2] In *Womack*, however, the final administrative determination had occurred on September 8, 1970, 18 months before the enactment of section 717. The Court of Appeals nonetheless held section 717 applicable in *Womack*, and expressly rejected the reasoning of the Sixth Circuit in the instant case.[3] Accordingly the conflict be-

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[1] *Bowers* upheld jurisdiction, *inter alia*, under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, a statute expressly relied on by Petitioner herein. Petition, p. 23.

[2] *Clark* does not so limit the prior decision in *Koger*. In *Clark* the administrative proceedings had been exhausted in January 1971, but suit was not filed until February 7, 1973. The Fourth Circuit did not reach the question of whether section 717 applied to claims not "pending" administratively on March 24, 1972, since it concluded that even if the section were so applicable the plaintiff in *Clark* had failed to commence his action within the time required by law. 499 F.2d at 133.

[3] After noting the opinions of the Sixth Circuit, below, and the Fourth Circuit in *Koger*, the court in *Womack* concluded:

> "Having examined carefully both opinions, as well as the many District Court opinions and the arguments of the parties before us, we are persuaded that the Fourth Circuit's

tween the circuits is not limited as asserted by respondents.

The practical importance of the question presented by this case is discussed at pp. 11-14 of the Petition. To date there are 22 reported lower court decisions on whether section 717 applies to discrimination occurring before its effective date, most of them decided within the last year. The number of as yet unreported cases presenting this question is doubtless substantially greater. Almost half of all reported cases filed under section 717 have involved discrimination prior to March 24, 1972. Many of these cases are class actions, and the rights of thousands of federal employees are at stake. The rights of such employees should not turn on the circuit in which they happen to work. Although the government describes this question as "not of continuing significance",[4] the government has every intention of continuing to use this issue as its most significant obstacle to judicial review of claims of discrimination.

Respondents do not deny that the conflict regarding section 717 will be important for many years in determining the scope of injunctive relief available to redress continuing practices of discrimination which originated before 1972. The government suggests, however, that Title VII forbids awards of back pay for discrimination prior to March 24, 1972, unless an administrative complaint was filed before March 24, 1974. This is incorrect. Section 706(g), 42 U.S.C. 2000e-5(g), referring to charges filed with the Equal Employment Opportunity Commission,

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analysis is the better, both standing alone and in light of its convincing rebuttal of the statutory construction linchpin of the *Place*, decision. Accordingly we adopt the reasoning of *Koger*." 8 EPD p. 5952.

[4] Memorandum For The Respondents In Opposition, p. 3.

provides: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." This two year statute of limitations does not apply to charges of *federal* discrimination, for those charges are not filed with or considered by the Commission, but are processed by the agency or department where the employee works. See 42 U.S.C. § 2000e-16. Even if the two year statute of limitations did apply to federal employees, the back pay claims affected by the conflict in circuits—those filed before March 24, 1974—would include over 6,000 individual complaints[5] in addition to such classes of employees as those complainants might represent.

The present conflict among the circuits is an open invitation to forum shopping. An aggrieved federal employee suing under section 717 may file that action either in the district where he or she works, or in the District of Columbia. 42 U.S.C. § 2000e-5(f)(3). A federal employee working in the Sixth Circuit, or in any other circuit or district adopting the constricted view of section 717 used below, can evade that restriction and obtain more complete relief by suing instead in the District of Columbia where the law is controlled by *Womack* v. *Lynn*, 8 EPD ¶ 9709 (D.D.C. 1974). This difference in the applicable law will be important for many years to come to federal employees suing to redress patterns of continuing discrimination which generally arose prior to 1972. Certiorari is usually granted to resolve conflicts among the circuits precisely for the purpose of avoiding such forum shopping.

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[5] See Memorandum from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity to Irving Kator, Assistant Executive Director, entitled "Government Wide Equal Employment Opportunity Counseling and Discrimination Complaint Activity, Fiscal Year 1972 to Fiscal Year 1974."

The Solicitor General, although opposing Certiorari, does not undertake to defend the merits of the decision of the Court of Appeals. The decision below is clearly in conflict with this Court's decision in *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed. 2d 476 (1974). Under these circumstances, and in order to avoid further delay in the implementation of Section 717, Petitioner would urge that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit and that that judgment be reversed *per curiam*.

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PETITION FOR REHEARING

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CASPAR WEINBERGER, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order vacating its denial of the Petition for Writ of Certiorari, entered on November 25, 1974, and granting the petition. This petition for a rehearing is founded upon the decision of the Second Circuit Court of Appeals in *Brown* v. *General Services Administration* (No. 73-2628) (November 21, 1974), pp. 1a-17a, Petition For Writ of Certiorari filed December , 1974, No. 74- .[1]

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[1] Counsel were notified by telephone of the decision in *Brown* in the late afternoon of Thursday, November 21, 1974, and obtained a copy of the decision in the afternoon of Friday, November 22, 1974. The instant Petition For Writ of Certiorari was considered at the conference of Friday, November 22, 1974, the result of which was announced on Monday, November 25, 1974. Under the circumstances Petitioner, of course, had no opportunity to bring this development to the attention of the Court prior to the denial of Certiorari.

The instant case presents the question, *inter alia,* whether the new remedies of section 717 of the 1964 Civil Rights Act, as amended, apply to discrimination occurring prior to March 24, 1972, the date on which that section became law. Section 717, 42 U.S.C. § 2000e-16, authorizes the district courts to provide to federal employees aggrieved by discrimination on the basis of race or sex the same remedies available to employees of private employers. There is a conflict among the courts of appeals on this question; three circuits have concluded that section 717 is applicable to discrimination occurring before March 24, 1972, and one circuit, in the instant case, has concluded that it is not. On November 25, 1974, this Court denied the Petition For Writ of Certiorari, Justices Stewart, White and Douglas voting to grant the writ. Whenever a federal employee has sought to assert federal jurisdiction under section 717 to remedy such discrimination, the government, in three circuits and at least twenty-four district courts, including the instant case, has opposed judicial scrutiny of such claims of discrimination by arguing that section 717 *does not* apply to discrimination occurring before March 24, 1972.

In *Brown* v. *General Services Administration* the government successfully advanced the opposite contention in preventing judicial scrutiny of Mr. Brown's claims; in the Second Circuit the government contended that section 717 *does* apply to discrimination occurring before March 24, 1972. The government there urged that section 717 had repealed a variety of statutes on which plaintiff founded his cause of action. Since the discrimination of which plaintiff complained had occurred prior to March 24, 1972, the government argued that section 717, and thus the repeal, applied to such discrimination occurring before the effective date of the section 717.

The Second Circuit, in holding at the instance of the government that section 717 applied to discrimination before its effective date, expressly rejected the contrary conclusion reached by the Sixth Circuit, also at the urging of the government, in this very case.

> In light of *Bradley*, we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger, supra,* that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only.[2]

At oral argument in *Brown,* the government expressly relied on *Koger* v. *Ball,* 497 F.2d 702 (4th Cir. 1974) and urged that this Court's decision in *Bradley* v. *School Board of the City of Richmond,* 40 L.Ed 2d 476 (1974), dictated that section 717 be applied to discrimination occurring prior to March 24, 1974. In the instant case petitioner advanced the identical argument[3] but the government refused to acknowledge its correctness.

That the government advanced inconsistent positions in these two cases was not the result of inadvertence. In *Brown* the government, in stating its assumption that section 717 applied to discrimination occurring before March 24, 1972, conceded the government "has argued differently" in other cases.[4] The Solicitor General was also made aware of the inconsistent position being taken by the government in different circuits.[5] Had the Solicitor General, in response to the Petition in this case, taken a definitive position as to whether or not the government maintained the decision of the Sixth Circuit was correct,

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[2] P. 11a.

[3] Petition for Writ of Certiorari, No. 74-116, pp. 17-19.

[4] Brief for Defendants-Appellees No. 73-2628, 2d Cir., p. 6 n.

[5] See Petition for Writ of Certiorari, p. 19.

uniformity in the position of the government in other case might have resulted. Instead, the Solicitor opposed Certiorari solely on the ground that the decision below was unimportant, thus avoiding committing the government to one position or the other.[6]

It has long been a precept of Anglo-Saxon jurisprudence, at least since Lord Mansfield's opinion in *Montefiori* v. *Montefiori*, 25 K.B. 203 (1762), that a party must not be permitted to advance inconsistent positions in judicial proceedings. See, e.g. Story's Equity Jurisprudence, 14th ed., § 2020.[7] The rule prevents a party from encouraging the growth of conflicts among the courts by seeking to win two inconsistent decisions where consistency would preclude him from winning more than one. "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts will not tolerate. . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953).

This Court has applied that principle in a variety of cases. In *Callanan Road Co.* v. *United States*, 345 U.S. 507 (1953), this Court refused to permit the holder of a certificate of convenience and necessity to collaterally attack the provisions of its certificate. The Court noted that, in obtaining its certificate, the holder had earlier

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[6] Memorandum for the Respondents in Opposition, pp. 2-4.

[7] See also 1B Moore's Federal Practice, ¶ 0.405[8]; Note, 59 Harv. L.Rev. 1132 (1946); Note, "Estoppel Against Inconsistent Positions in Judicial Proceedings", 9 Brooklyn L. Rev. 245 (1940); Note, 1 Tenn. L.Rev. 1 (1922). The principle was expressed by Lord Kenyon in the maxim, "*Allegans contraria non est audiendus*".

argued before the Interstate Commerce Commission that the provisions of such certificates were not subject to collateral attack. This Court held that "[t]he appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval." 345 U.S. at 513. In *Davis* v. *Wakelee,* 156 U.S. 680 (1895), Wakelee had obtained a final state court judgment against Davis on certain notes following service by publication. When Wakelee sought to assert the underlying claim in a bankruptcy action, the bankrupt Davis successfully argued that Wakelee need not, and thus could not, do so since the claim had already been reduced to a valid final judgment and was not dischargeable. Thereafter Davis moved to set aside the original judgment on the ground that service by publication was unconstitutional, relying on *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). This Court forbade Davis from maintaining such an inconsistent position as to the legality of service and the validity of the resulting judgment. 156 U.S. at 689-691.[8] See also *Philadelphia R.R. Co.* v. *Howard,* 54 U.S. (14 How) 307 (1851), *Ohio R.R. Co.* v. *McCarthy,* 96 U.S. 258 (1878).

These principles apply *a fortiori* when the party seeking to advance inconsistent positions is the government. A private party has an interest in winning an action regardless of the arguments or maneuvers it may use. The government's overriding interest is that justice should be

[8] "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim it was rendered without personal service upon him."

done; so long as that occurs the government has won, regardless of whether a particular defendant goes free or a civil litigant obtains injunctive or monetary relief. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Six circuits considering this question have all held that the government may not advance inconsistent positions.[9] As the Second Circuit pointed out in *Staten Island Hygeia Ice Co.* v. *United States*, 85 F.2d 68, 72 (1936), "[t]here is nothing in the nature of sovereignty or in the recognized prerogatives of the sovereign that would allow the government to take and keep a right without the accompanying burden".

The due administration of justice would be materially advanced by requiring the Solicitor General to respond to this Petition For Rehearing and to state definitively whether the government maintains that section 717 does or does not apply to discrimination occurring prior to March 24, 1974. If the Solicitor General adheres to the government's position in *Brown*, the instant case can be summarily reversed.[10] If the Solicitor General adheres to the government's position in the Sixth Circuit, the issues presented by the pending Petition for Writ of Certiorari in *Brown* will be substantially simplified, and the necessity for a grant of certiorari in the instant case, in view of the new and conflicting decision of yet another court

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[9] *Goodman* v. *Public Service Commission*, 467 F.2d 275 (D.C. Cir. 1972); *United States* v. *Fox Lake State Bank*, 366 F.2d 962, 965-66 (7th Cir. 1966); *Vestal* v. *C.I.R.*, 152 F.2d 132 (D.C.Cir. 1945); *Eichelberger & Co.* v. *C.I.R.*, 88 F.2d 874 (5th Cir. 1937); *United States* v. *Brown*, 86 F.2d 798 (6th Cir. 1936); *Staten Island Hygeia Ice Co.* v. *United States*, 85 F.2d 68 (2d Cir. 1936); *United States* v. *Denver, etc., R.R.*, 16 F.2d 374, 376 (8th Cir. 1926).

[10] See, regarding the effect of such confessions of error *Urrutia* v. *United States*, 357 U.S. 577 (1958); *Howard* v. *United States*, 356 U.S. 25 (1958).

of appeals, will be manifest. Compare *Sanitary Refrigerator Co.* v. *Winters,* 280 U.S. 30, 34 n. (1929). Directing the Solicitor General to submit such a response is the most expeditious manner of precluding the government from continuing to advance different positions in different courts of appeal.

The inconsistent positions taken by the respondents doubtless reflect a good faith belief by the Department of Justice that it would be extremely undesirable to permit inquiry into claims that federal officials are breaking the law by discriminating on the basis of race or sex. But the national policy in this regard is to be made, not by lawyers in the executive branch, but by Congress. It was Congress which prohibited such discrimination in 1957. And it was Congress which, over the objections of the executive branch, mandated such judicial scrutiny in 1972. The issue presented by this case is the extent to which attorneys within the Department of Justice can thwart or delay implementation of congressional policy by asserting whichever of two inconsistent theories will, in any particular case, prevent aggrieved employees from obtaining a judicial remedy. It is the very essence of a government of laws that there should be, in a case such as this, but one rule, uniform and invariable, applied to all citizens, regardless of whether, in some instances, the result of that application may be displeasing to the men who chance to hold public office. *United States* v. *United Mine Workers,* 330 U.S. 258, 307-08 (1947) (Frankfurter, J. concurring). The ultimate responsibility for vindicating that principle is imposed by the Constitution on this Court.

CONCLUSION

For the above reasons, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court direct the Solicitor General to respond to this Petition for Rehearing, and that the Court thereafter grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Counsel for Petitioner

Certificate of Counsel

As counsel for petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

.....

Counsel for Petitioner

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 935—September Term, 1973.

(Argued June 14, 1974 Decided November 21, 1974.)

Docket No. 73-2628

CLARENCE BROWN,

Plaintiff-Appellant,

v.

GENERAL SERVICES ADMINISTRATION, UNITED STATES OF AMERICA, TRANSPORTATION AND COMMUNICATIONS SERVICE, COMMUNICATIONS DIVISION, REGION 2, JOSEPH A. DALY, Regional Director, Transportation and Communications Service, ALBERT GALLO, Chief, Communications Division and FRANK A. LAPOLLA, Acting Chief, Communications Division, Transportation and Communications Service, Region 2,

Defendants-Appellees.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing a complaint which alleged racially discriminatory em-

ployment practices on the part of an agency and officials of the federal government.

Affirmed.

ERIC SCHNAPPER, New York, N.Y. (Jeff Greenup, Jack Greenberg, James M. Nabrit, III, Johnny J. Butler, Joseph P. Hudson and Greenup & Miller, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

CHARLES FRANKLIN RICHTER, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and Gerald A. Rosenberg, Asst. U.S. Atty., New York, N.Y., on the brief), *for Defendants-Appellees.*

TIMBERS, *Circuit Judge:*

This appeal from a judgment entered September 28, 1973 in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing the complaint in an action brought against an agency and officials of the federal government to redress alleged racially discriminatory employment practices presents the questions (1) whether Section 717(c) of the Equal Employment Opportunity Act of 1972[1] applies retroactively to claims arising before its

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1 Section 717(c) of the Equal Employment Opportunity Act of 1972 as codified in 42 U.S.C. §2000e-16(c) (Supp. II 1972), provides in pertinent part:

"Within thirty days of receipt of notice of final action taken by [an] . . . agency, or by the Civil Service Commission upon an appeal from a decision or order of such . . . agency . . . on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred

enactment; (2) whether the statute pre-empts any other federal jurisdictional basis for appellant's claim; and (3) whether in any event appellant has failed to exhaust administrative remedies. We hold that each of these questions must be answered in the affirmative. We affirm.

I. Facts

Appellant Clarence Brown, a black, has been employed by the General Services Administration (GSA) Regional Office No. 2 (New York City) since 1957. He has not been promoted since 1966. His current job classification is Communications Specialist, GS-7, Telecommunications Division, Automated Data Telecommunications Service.

In December 1970, Brown was referred for promotion to GS-9 by his supervisors along with two white employees, Ownbey and Trost. All three were rated "highly qualified". Trost was the only one promoted. Brown filed an administrative complaint of racial discrimination with the GSA Equal Employment Opportunity Office. The complaint was withdrawn, however, after Brown was told that further promotions would soon be available and that he had been denied promotion because of lack of the requisite "voice experience".

Brown claims that he thereafter acquired full "voice experience". In June 1971, another GS-9 promotional opportunity opened. Brown and Ownbey again were rated "highly qualified" for the opening. A third white employee also was available. Ownbey was chosen.

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and eighty days from the filing of the initial charge with the . . . agency . . . or with the Civil Service Commission on appeal from a decision or order of such . . . agency . . . until such time as final action may be taken by [an] . . . agency, . . . an employee . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the . . . agency, . . . shall be the defendant."

On July 15, 1971, Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office, claiming racial discrimination in the denial of his promotion. An investigative report was prepared. After review, the GSA Regional Administrator determined that there was no evidence of racial discrimination and so informed Brown by letter dated October 19, 1972. This letter also informed Brown that he could request a hearing on his complaint within seven days; but that if he did not make such a request, the determination would become the final agency decision and he would then have the right to appeal the GSA's decision to the Board of Appeals and Review of the Civil Service Commission (CSC), or to file a civil action in the federal district court within 30 days.

Brown requested a hearing. It was held on December 13, 1972 before a complaints examiner of the CSC. Brown was represented by counsel. On February 9, 1973, the complaints examiner issued his findings and recommended decision. He found no evidence of discrimination and recommended that no action be taken on the basis of the complaint.

By letter dated March 23, 1973, received by Brown on March 26, the GSA Director of Civil Rights rendered the final agency decision that the evidence did not support the complaint of racial discrimination. The letter, pursuant to regulations, included a copy of the transcript of the hearing and of the findings and recommended decision of the complaints examiner. The letter also advised Brown of his options: (1) to file an appeal with the Board of Appeals and Review of the CSC within 15 days after receipt of the letter, in which case he could commence a civil action in the federal district court within 30 days after receipt of the Board's decision or 180 days after filing the appeal if no decision had been rendered; or (2) to commence a

civil action in the federal district court within 30 days after receipt of the letter.[2]

Brown did not file an appeal with the Board. Instead, he commenced the instant action in the district court on May 7, 1973—more than 30 days after receipt of the letter. His complaint named as defendants the GSA and Brown's superiors, Joseph A. Daly, Albert Gallo and Frank A. Lapolla.

Basically, Brown's complaint alleges that he has been denied promotions because of his race.[3] Apparently he seeks a promotion to Communications Assistant, GS-9, a supervisory position, and appropriate back pay, although some reference is made in his brief to damages based on discrimination.

The original complaint alleged jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1970); Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16 (Supp. II 1972); 28 U.S.C. §1331 (1970); and the Declaratory Judgment Act, 28 U.S.C. §§2201-02 (1970). The complaint also sought to invoke jurisdiction to secure protection of and redress deprivation of rights secured by 42 U.S.C. §§2000e et seq. (1970) and 42 U.S.C. §1981 (1970). The complaint demanded "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay."[4]

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2 The provisions for civil actions are set forth in Section 717(c) of the Equal Employment Opportunity Act, 42 U.S.C. §2000e-16(c) (Supp. II 1972). See note 1 *supra*.

3 The position of the GSA is that Brown is a somewhat uncooperative employee and therefore has not been promoted. The substantive dispute, however, is not before us on this appeal. Our decision is limited to the threshold jurisdictional questions presented.

4 Relief available under Title VII and the regulations promulgated thereunder would include retroactive promotion with back pay and attorney's fees. 42 U.S.C. §§2000e-16(d), 2000e-5(g) (Supp. II 1972); 42 U.S.C. §2000e-5(k) (1970); 5 C.F.R. §713.271(b) (1974).

On July 23, 1973, defendants moved to dismiss the complaint on the ground that the court lacked subject matter jurisdiction since Brown had not filed his complaint within 30 days as required by Section 717(c) of the Equal Employment Opportunity Act of 1972 and his action therefore was barred by sovereign immunity.

On September 18, 1973, Brown moved for leave to file an amended complaint. The proposed amended complaint sought to add the CSC and Selbmann, the complaints examiner, as defendants, the original complaint having stated that the CSC had been joined as a party defendant although it was not actually named. The amended complaint also alleged as additional bases of jurisdiction 28 U.S.C. §1343 (4) (1970) and the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970), and added an allegation that more than $10,000 was in controversy.[5]

In a memorandum opinion filed September 27, 1973, Judge MacMahon held that Brown's action was barred by sovereign immunity and that the district court therefore lacked subject matter jurisdiction. The judge also denied the motion for leave to amend on the ground that the original complaint had been dismissed and the proposed amended complaint did not change the situation.

The essential questions thus presented are whether Section 717(c) of the Equal Employment Opportunity Act of 1972 is to be applied retroactively to claims arising before but pending administratively at the time of its enactment; if so, whether that Act pre-empts any other avenue of judicial review; and whether in any event appellant has failed to exhaust administrative remedies.

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5 Although the original complaint had alleged jurisdiction under 28 U.S.C. §1331 (1970), no jurisdictional amount was alleged.

II. Legislative History and Statutory Provisions

We believe that a key to the resolution of these questions may be found in the legislative history and the statutory provisions that emerged.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex or national origin. 42 U.S.C. §§2000e-2 to -3 (1970), as amended (Supp. II 1972). As originally enacted in 1964, however, it did not apply to federal employees. 42 U.S.C. §2000e(b) (1970). Executive Orders[6] and agency regulations covered their complaints of employment discrimination.[7] In general, the agency itself conducted an investigation and hearing on such complaints. Although the hearing examiner might come from an outside agency, especially the CSC, the head of the employee's agency made the final agency determination. Appeal lay only to the Board of Appeals and Review of the CSC.[8]

No private right of action was provided for federal employees by Title VII until 1972 when Congress amended the Equal Employment Opportunity Act by adding Section 717(c). The legislative history of this section generally evinces a concern that job discrimination had not been eliminated in the federal government. It indicates the dissatisfaction of federal employees with the complaint procedures available. The committee reports show that Congress was not persuaded by testimony of agency officials that legislation was not needed because a private right

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6 See Exec. Order No. 11478, as amended, Exec. Order 11590, 3 C.F.R. 207 (1974), 42 U.S.C. §2000e, at 10,297 (1970); Exec. Order 11246, as amended, Exec. Order 11375, 3 C.F.R. 169 (1974), 42 U.S.C. §2000e, at 10,294-97 (1970).

7 See 5 C.F.R. Pt. 713 (1971).

8 *Id.*; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, at 410, 423 (1972) (hereinafter cited as Legislative History).

of action already existed. They note that, even if such right was available, the federal employee faced defenses of sovereign immunity and failure to exhaust administrative remedies; and, even if such defenses were overcome, the relief available, such as back pay or immediate advancement, was in doubt.[9]

It was against this backdrop that Congress in 1972 provided a private right of action for federal employees who were not satisfied with the agency or CSC decisions. Under Section 717(c), an aggrieved employee may commence an action in a federal district court within 30 days after a final order by his agency on a complaint of discrimination based on race, color, religion, sex or national origin, *or* within 30 days after a final order of the CSC on an appeal from such an agency decision, *or* after the elapse of 180 days from the filing of the initial complaint with the agency or of the appeal with the CSC if no decision has been rendered. No appeal need be taken to the CSC. The employee may go directly to court after the agency decision. 42 U.S.C. §2000e-16(c) (Supp. II 1972), note 1 *supra*.

III. Retroactivity

Brown's administrative complaint was filed with the GSA in 1971. It was under agency consideration at the time of the enactment of Section 717(c) on March 24, 1972. The question of retroactivity thus presented is whether the section should be applied to claims of discrimination which arose before its effective date but were awaiting final administrative decision at that time.[10] Retroactivity in this

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9 H. R. Rep. No. 92-238, 92d Cong., 1st Sess. 23-26 (1971), in Legislative History 61, 82-86; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14-17 (1971), in Legislative History 410, 421-26.

10 Cf. *Petterway* v. *Veterans Administration Hospital*, 495 F.2d 223 (5 Cir. 1974) (Section 717(c) held not applicable to pre-Act claim of federal employment discrimination because complaint was no longer

context refers only to the claim; the district court complaint in the instant action was filed on May 7, 1973—well after the date of enactment.

All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they assume retroactive operation in their arguments here although they have argued otherwise elsewhere. Appellant argues that the section is not applicable to the instant action precisely because he did not file his complaint within the required 30 days and that other statutes provide a jurisdictional basis for his action.

The issue of retroactive application of this statute has resulted in a conflict between the circuits. The District of Columbia and Fourth Circuits have held that Section 717(c) applies retroactively to claims pending at the time of its enactment. *Womack* v. *Lynn*, —— F.2d —— (D.C. Cir. 1974) (No. 72-1827, filed October 1, 1974); *Koger* v. *Ball*, 497 F.2d 702 (4 Cir. 1974). The Sixth Circuit has held that it does not. *Place* v. *Weinberger*, 497 F.2d 412 (6 Cir. 1974). The district courts have gone both ways. Compare, e.g., *Ficklin* v. *Sabatini*, 378 F.Supp. 19 (E.D. Pa. 1974) (retroactive); *Henderson* v. *Defense Contract Administration Services*, 370 F.Supp. 180 (S.D.N.Y. 1973) (retroactive); *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) (retroactive) with *Moseley* v. *United States*, No. 72-380-S (S.D. Cal., filed January 23, 1973) (non-retroactive); *Hill-Vincent* v. *Richardson*, 359 F.Supp. 308 (N.D. Ill. 1973) (non-retroactive).

The conflict as to retroactivity has turned on whether Section 717(c) is to be viewed as providing a new substantive right for federal employees or whether it merely provides a new remedy for enforcing an existing right.

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pending in agency at time of enactment and because complaint was filed beyond 30 day period).

The pre-1972 right of a federal employee not to be discriminated against is said to be found in Congressional enactments, 5 U.S.C. §7151 (1970), and Executive Orders. Exec. Orders 11247, 11478, note 6 *supra*. Courts which have adopted the view that Section 717(c) provides a new remedy for enforcing an existing right have held the section retroactive on the grounds that it is remedial, *Henderson* v. *Defense Contract Administration Services, supra*, or that it is procedural. *Koger* v. *Ball, supra*.

Courts which have refused to give retroactive effect to the statute, aside from rejecting the view that Section 717(c) merely creates a new remedy for a pre-existing right, have held that Congress intended only certain portions of the Equal Employment Opportunity Act to be retroactive for the reason that in Section 14 of the Act, in 42 U.S.C. §2000e-5, at 1,257 (Supp. II 1972), there is a specific provision that amendments to one section of Title VII are to be given retroactive effect, and since there is no reference in Section 14 to Section 717(c), the latter should not be given retroactive effect. See, e.g., *Place* v. *Weinberger, supra*.

This latter view strikes us as being inconsistent with the underlying principle of *Bradley* v. *School Board of City of Richmond*, —— U.S. —— (1974), 42 U.S.L.W. 4703 (U.S. May 15, 1974). There the Supreme Court held that a statute[11] authorizing a federal court to award attorney's fees in school desegregation cases should have been applied by the Court of Appeals so as to result in the affirmance of the decision of the District Court which had awarded such fees on the basis of its general equity power, since the statute was enacted after the District Court's award but before

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11 Section 718 of the Emergency School Aid Act, Title VII of the Education Amendments of 1972, 20 U.S.C. §1617 (Supp. III 1973).

the Court of Appeals' decision. The rationale of the Supreme Court's decision was stated as follows:

> "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." —— U.S. at ——, 42 U.S.L.W. at 4707.

We believe that this principle applies here. Neither the statute itself nor the legislative history gives any direction as to whether Section 717(c) should be applied to complaints pending within the agency at the time of its enactment. In light of *Bradley*, we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger, supra*, that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only. As the Supreme Court stated in *Bradley:*

> "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.
>
> Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. . . ." —— U.S. at ——, 42 U.S.L.W. at 4708.

While *Bradley* dealt with a court of appeals' review of a district court's decision, we believe that the underlying principle is applicable to a review by a district court of an agency decision. So far as the statutory language and the relevant legislative history are concerned, retroactive application of Section 717(c) would appear to be appropriate.

This does not end our analysis under *Bradley*. We must determine whether application of a change in law to pend-

ing claims "would result in manifest injustice". —— U.S. at ——, 42 U.S.L.W. at 4707. In each of the cases where Section 717(c) has been applied retroactively, it was done to *aid* a plaintiff in the prosecution of his complaint. See, e.g., *Koger* v. *Ball, supra.* In view of the policy of the federal government against discrimination in federal employment and its encouragement of efforts to eliminate such discrimination in the private and state and local government sectors, such retroactive application of the statute appears sound. If Section 717(c) is held applicable here, however, Brown's claim must fall since he admittedly has failed to comply with its 30 day filing requirement.

We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument, particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it.[12] In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since we hold below that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

IV. Pre-emption

Appellees argue that, whatever may be the merits of the alternative bases for jurisdiction asserted by appellant,

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12 It is interesting to note that both the original complaint and the proposed amended complaint invoked Section 717 as one basis of jurisdiction in the district court.

they are pre-empted by Section 717(c). Neither the Act itself nor its legislative history conclusively demonstrates that such pre-emption was intended. Congress enacted Section 717(c) to provide a private right of action for federal employees—a right it believed to have been previously non-existent or so difficult to enforce as to have been in effect non-existent. The most persuasive argument in favor of pre-emption is that the Act constitutes a waiver of sovereign immunity and as such must be strictly construed.

The doctrine of sovereign immunity forbids suits against the government without its consent. Sovereign immunity in the present context involves not only that of the United States but also that of its officers in performing their official functions. As the Eighth Circuit succinctly put it:

> "A suit against an officer of the United States is one against the United States itself 'if the decree would operate against' the sovereign, *Hawaii* v. *Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed. 2d 191 (1963); or if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration', *Land* v. *Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act', *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949)...." *Gnotta* v. *United States*, 415 F.2d 1271, 1277 (8 Cir. 1969) (Blackmun, J.), *cert. denied*, 397 U.S. 9[illegible] (1970).

The court in *Gnotta* held that demands for promotion and back pay fall within the scope of this immunity as they necessarily involve expenditures from the Treasury and compel the exercise of administrative discretion in an official personnel area. 415 F.2d at 1277. This is precisely the relief demanded in the instant case.

Sovereign immunity would bar prosecution of this action absent an effective waiver. Congress can impose restrictions on its consent to be sued, *Battaglia* v. *United States*, 303 F.2d 683, 685 (2 Cir.), *cert. dismissed*, 371 U.S. 907 (1962), including limitations on the time within which suit must be commenced. *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1357 (5 Cir. 1972). The consent Congress has given for the instant type of action is set forth in Section 717(c). Such consent is conditioned on compliance with the 30 day filing requirement.

Statutes waiving sovereign immunity are to be strictly construed. But assuming, as appellant argues, that decisions of the Supreme Court illustrate a more liberal attitude with regard to waivers of sovereign immunity at least where a federal agency is concerned, see *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939), we cannot ignore the explicit condition imposed by Congress on a suit such as the instant one. It would wholly frustrate Congressional intent to hold that a plaintiff could evade the 30 day filing requirement "by the simple expedient of putting a different label on [his] pleadings." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973).

The instant complaint was filed more than a year after passage of the 1972 Act. Brown had notice of its provisions. He has offered no excuse for failure to comply, nor has he addressed the issue of retroactivity. We find no injustice in requiring compliance with the 30 day filing requirement. On the contrary, to permit suit without compliance with the conditions imposed by Section 717(c) would effectively undermine the strong public policy that requires strict construction of a statute which waives sovereign immunity.[13]

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13 In view of our holding, we find it unnecessary to consider appellant's claims that jurisdiction can be founded on 28 U.S.C. §1361 (1970)

V. Failure to Exhaust Administrative Remedies

Finally, even if we were to hold in favor of Brown on the issues discussed above, his claim would fall for failure to exhaust administrative remedies under regulations in effect prior to the 1972 Act. Although he pursued these remedies to the extent of obtaining a final agency decision, he failed to appeal to the Board of Appeals and Review of the CSC. See 5 C.F.R. §§713.231 to .234 (1974), 34 Fed. Reg. 5371 (1969).

Assuming without deciding that exhaustion of federal administrative remedies may not be required in every case of alleged discriminatory federal employment practices, cf. *McKart* v. *United States*, 395 U.S. 185 (1969); but see *Penn* v. *Schlesinger*, 490 F.2d 700, 707-14 (5 Cir. 1973) (dissenting opinion), *rev'd en banc*, 497 F.2d 970 (5 Cir. 1974) (adopting panel dissent), there is nothing in the allegations of Brown's complaint which justifies the "premature interruption of the administrative process." *McKart* v. *United States, supra*, 395 U.S. at 193. The "notions of judicial efficiency" stressed by the Court in *McKart* are particularly applicable here:

> "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." 395 U.S. at 195.

For aught that appears in the record before us, we cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. Since he did not exhaust his administrative remedies, however, we have been presented with troublesome jurisdictional questions

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(mandamus); the Administrative Procedure Act, 5 U.S.C. §§701-06 (1970); the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970); and 42 U.S.C. §1981 (1970) and 28 U.S.C. §1343(4) (1970).

which must be resolved before the substantive issue of discrimination can even be considered. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 712.

Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. Cf. *McKart* v. *United States, supra,* 395 U.S. at 200; *Eisen* v. *Eastman,* 421 F.2d 560, 569 (2 Cir. 1969), *cert. denied,* 400 U.S. 841 (1970). Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. §713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 706.

Under the circumstances of this case, we hold that Brown inexcusably failed to exhaust available administrative remedies.

Conclusion

Clearly the federal courts have jurisdiction under Section 717(c) of the Equal Employment Opportunity Act of 1972 to review claims by federal employees of discriminatory employment practices. Brown's failure to comply with the statutory requirements with respect to appealing to the Board of Appeals and Review of the CSC, or by commencing a timely action in the district court, has presented the threshold jurisdictional issues to which this opinion is addressed. We hold that his failure to commence the instant action in the district court within 30 days of the final agency decision is fatal to his com-

plaint since Section 717(c) operates retroactively and preempts any other avenue of judicial review; and that he has failed to exhaust available administrative remedies. The entire process of administrative review by the CSC and of judicial review within the 30 day period for seeking such review makes no sense at all if an employee may simply ignore the statutory requirements.

Affirmed.

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APR 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Petitioner Diane M. Place submits this supplemental memorandum in support of her Petition for Rehearing.

As is set out more fully in the Petition for Rehearing, the United States in *Brown* v. *General Services Administration,* 507 F.2d 1300 (2d Cir. 1974) argued in the Second Circuit that section 717 *does* apply to acts of discrimination occurring before March 24, 1972, the direct opposite of the position taken by the government in the Sixth Circuit in the instant case. By successfully advancing conflicting arguments in different courts of appeals the United States thus brought about a conflict between those circuits. A Petition for a Writ of Certiorari was filed in *Brown* v. *General Services Administration* on December 20, 1974. No. 74-768. In view of the government's role in creating this conflict between *Brown* and the instant case, it was clearly incumbent upon the Solicitor General in responding to the petition in *Brown* to advise this Court which decision the

United States maintained was correct. Instead, the Solicitor General opposed certiorari in *Brown*, as he did in this case, while refusing to take any position on the merits of the decision,[1] so as to leave government attorneys free to continue to advance conflicting arguments in the lower courts. Thus the United States, having successfully advanced inconsistent positions in two courts of appeals, now asks this Court to simultaneously uphold *both* of the conflicting decisions. Petitioner submits that it would be inappropriate to do so in light of this Court's responsibility to maintain uniformity among the circuits and to relieve the lower federal courts of the burden of resolving questions which arise solely because of the government's refusal to adhere to a single position.

Petitioner also asserted below and in this Court that federal jurisdiction over her claims existed under several federal statutes enacted prior to section 717, including 28 U.S.C. § 1361, an argument which the Sixth Circuit rejected. In opposing Certiorari in the instant case, the Solicitor General took no position on the merits of this argument. The petitioner in *Brown* also argued that federal jurisdiction existed under these earlier statutes. In *Brown* the Solicitor General contested the existence of such jurisdiction on the sole ground that Brown had not exhausted his administrative remedies.[2] In the instant case, however, petitioner Place did exhaust her administrative remedies. It thus appears that, in opposing Certiorari on this issue in the instant case, the Solicitor General is asking this Court to uphold a decision which he believes to be incorrect.

The failure of the Solicitor General to take a position on the merits of the issues raised by this case, as his

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[1] Brief for Respondents in Opposition, *Brown* v. *General Services Administration*, No. 74-768, p. 5.

[2] *Id.*, p. 6.

similar failure in *Brown*,[3] is not fortuitous. It arises, as the Solicitor General has indicated,[4] from the differing interests and positions within the Department of Justice between the Civil Division, which is primarily concerned with winning civil suits against the United States, and the Civil Rights Division, which is primarily concerned with ending discrimination. Both fairness to individual litigants and the efficient administration of justice require that the Attorney General resolve these differences and enunciate unequivocally the position of the United States on the important questions of law at issue.

Accordingly, the government should be directed to respond to the Petition for Rehearing and to state its position on the following questions of law:

(1) Does section 717 of the Equal Employment Opportunity Act of 1972 provide a remedy for acts of discrimination occurring before March 24, 1972?

(2) Is federal jurisdiction over discrimination in employment by the United States on the basis of race or sex provided by 5 U.S.C. §§ 703-706, 28 U.S.C. §§ 1331, 1346, 1361, or 42 U.S.C. § 1981?

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[3] See Reply Memorandum in Support of Petition for Writ of Certiorari, *Brown* v. *General Services Administration*, No. 74-768.

[4] Letter of Robert Bork to Hon. Michael Rodak, regarding *Brown* v. *General Services Administration*, dated February 11, 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE, PETITIONER

v.

CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

On April 14, 1975, this Court requested the Solicitor General to file a response to the petition for rehearing of this Court's denial of certiorari. The petition for rehearing is founded on the assertion that "the government advanced inconsistent positions" (p. 3) in the courts of appeals in the present case and in *Brown* v. *General Services Administration*, 507 F. 2d 1300 (C.A. 2), pending on petition for a writ of certiorari, No. 74-768, with respect to the retroactive effect of Section 717(c) of the Equal Employment Opportunity Act of 1972. That assertion, as we show below, is inaccurate.

We do not oppose the petition for rehearing, however, because we have concluded that the position the government has previously taken in the lower federal courts on the retroactivity issue--a position adopted by the court of appeals in this case—is in error.

1. The government has consistently argued in the district courts and courts of appeals that Section 717(c) does not apply to federal employment discrimination claims in which the alleged discrimination took place prior to the effective date of the 1972 Act. With respect to cases in which a complaint had not finally been determined prior to the Act's effective date, that argument has been rejected by every court of appeals that has considered it, except for the Sixth Circuit in the present case. See *Koger* v. *Ball*, 497 F.2d 702 (C.A. 4); *Womack* v. *Lynn*, 504 F. 2d 267 (C.A. D.C.); *Sperling* v. *United States*, C.A. 3, No. 74-1533, decided April 18, 1975.

In *Brown* v. *General Services Administration*, *supra*, the retroactivity issue was not directly presented. Since the plaintiff there had failed to bring an action within the 30-day period specified by Section 717(c), he could not rely on that section as a basis of subject matter jurisdiction. He argued, instead, that jurisdiction was conferred by the Mandamus Statute (28 U.S.C. 1361), the Administrative Procedure Act (5 U.S.C. 701, *et seq.*), the Tucker Act (28 U.S.C. 1346), and the old civil rights legislation (28 U.S.C. 1343(4) and 42 U.S.C. 1981). Brown's appellate counsel (three of whom also represent petitioner in the present case) also argued in their brief to the court of appeals that "Congress did not intend Section 717 to be the exclusive judicial remedy available to federal employees" alleging employment discrimination (Br. 7).

The government's brief[1] responded by arguing that none of the statutes relied on by Brown conferred subject matter jurisdiction (pp. 19-28). The government also took issue with Brown's assertion concerning the preemptive effect of Section 717, arguing alternatively that, even if jurisdiction might otherwise have been conferred by the statutes invoked by Brown, Section 717 was intended by Congress to provide an exclusive judicial remedy.

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[1]We have lodged with the Clerk of this Court a copy of the government's brief in the court of appeals in *Brown*.

The government's brief did not argue that Section 717(c) should be applied retroactively to Brown's complaint (which alleged pre-March 24, 1972, discrimination). It argued only that *if* Section 717(c) were applicable, it would preclude reliance on other jurisdictional bases. The brief stated (p. 6, n.):

> This [preemption] argument presumes that the Act applies in the present case where the complaint, while alleging discrimination occurring before passage of the Act, was filed after the Act became effective. *Hackley* v. *Johnson*, 360 F. Supp. 1247, 1249 n. 1 (D.C. 1973), *appeal docketed*; *Henderson* v. *Defense Contract Administration Services Region*, 7 EPD para. 9058 (S.D. N.Y. 1974), have so held. The Government has argued differently in its appeal brief in *Hackley*. In any event, should this Court conclude that these holdings are correct, the fact that the Government has elsewhere argued otherwise is plainly immaterial.[2]

The court of appeals, which ultimately concluded, in part, that Section 717 did apply to Brown's complaint and was intended to be the exclusive judicial remedy for federal employment discrimination claims, made clear in its opinion that it correctly understood the government's preemption argument to be founded on an assumption *arguendo* that Section 717 was applicable. The court stated: "All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they

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[2]The Assistant United States Attorney who presented the oral argument before the court of appeals in *Brown* has informed us that he recalls stating during argument that there were conflicting court of appeals decisions on the retroactivity issue and that it was the position of the United States Attorney's office that retroactive application of the Act was the better view. He did not represent that to be the position of the government generally; indeed, he acknowledged, as did the brief, that the government had argued to the contrary in other cases.

assume retroactive operation in their arguments here although they have argued otherwise elsewhere" (507 F. 2d at 1305).[3]

2. Although the government has consistently argued that Section 717 applies only to discrimination occurring after enactment of the 1972 Act, we have reexamined our position in light of the additional court of appeals decisions holding to the contrary in certain circumstances. We have concluded, essentially for the reasons stated by the Fourth Circuit in *Koger* v. *Ball*, *supra*, 497 F. 2d at 704-709, and by the Second Circuit in *Brown* v. *General Services Administration*, *supra*, 507 F.2d at 1304-1306, that Section 717 does apply to claims of federal employment discrimination occurring prior to March 24, 1972, if the employee's complaint was the subject of administrative proceedings on that date or if a judicial proceeding had been timely commenced after final administrative action and was pending on the Act's effective date. In those circumstances, the applicability of Section 717 is consistent with "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the

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[3]Although the court in *Brown* held that Section 717 applied retroactively to the complaint and preempted other jurisdictional bases, it also held alternatively that the other bases of jurisdiction were unavailable to Brown because he failed to exhaust his available administrative remedies (507 F. 2d at 1307-1308). It was upon the latter ground that we opposed the petition for a writ of certiorari in *Brown*. Petitioner in the present case states that "it was clearly incumbent upon the Solicitor General in responding to the petition in *Brown* to advise this Court" of his position on the retroactivity issue (Supplemental Memorandum in Support of Petition for Rehearing, p. 1). But since the petition in *Brown* did not present the retroactivity issue, we do not see why the Solicitor General should be faulted for not addressing that question in his response.

contrary" (*Bradley* v. *Richmond School Board*, 416 U.S. 696, 711).[4] The government will accordingly acquiesce in this construction of the Act in all pending and future cases involving allegations of pre-1972 Act discrimination.[5]

We originally opposed the petition for a writ of certiorari in this case because of our view that the narrow conflict among the courts of appeals here is not of continuing importance. We adhere to that view. Since we have now reexamined the government's position on the legal issue in light of additional court of appeals decisions, however, we believe that it would be appropriate to grant the petition for rehearing and the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court for further consideration in light of our present position.[6]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]We adhere to the view that Section 717 is inapplicable to such claims where the administrative complaint was finally determined prior to the Act's effective date and no pending judicial proceeding had been timely initiated after the final administrative determination. See *Clark* v. *Goode*, 499 F. 2d 130 (C.A. 4).

[5]We have not been able to ascertain the number of such cases that are presently pending in the federal courts. The General Counsel's office in the Civil Service Commission roughly estimates that there are approximately 25 to 30 such cases.

[6]We note that, while the decision of the court of appeals in the present case was rendered five days after the Fourth Circuit's decision in *Koger* v. *Ball*, *supra*, the court did not refer to that decision and may have been unaware of it.